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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MIKOLA BOWDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has provided for enhanced statutory penalties for drug offenders with one or more prior felony drug convictions. See, *e.g.*, 21 U.S.C. 841(b)(1). Section 851(a) of Title 21 provides that no defendant may be sentenced to such enhanced penalties unless, before trial or the entry of a guilty plea, the government files and serves an information "stating in writing the previous convictions to be relied upon." 21 U.S.C. 851(a).

The question presented is whether the notice requirements of Section 851(a) are "jurisdictional," such that they must be noticed on appeal or collateral review regardless whether the defendant preserved the claim in the district court.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statutory provision involved 2
Statement 2
Reasons for granting the petition:
A. The decision of the court of appeals is incorrect 11
B. The court of appeals' decision solidifies an existing conflict among the circuits 16
C. The question presented is important and squarely implicated in this case 19
Conclusion 24
Appendix A – Court of appeals opinion (Jan. 7, 2009) 1a
Appendix B – Court of appeals order denying rehearing (Mar. 30, 2009) 4a
Appendix C – Indictment (May 17, 2006) 6a
Appendix D – Notice of enhancement (July 5, 2006) 10a
Appendix E – Statement of facts and elements of the offenses (June 22, 2006) 12a
Appendix F – Plea and cooperation agreement (July 13, 2006) 17a
Appendix G – Transcript of rearraignment (July 13, 2006) 26a
Appendix H – Transcript of sentencing hearing (Oct. 11, 2006) 43a
Appendix I – Statutory appendix 53a

TABLE OF AUTHORITIES

Cases:

Bain, Ex parte, 121 U.S. 1 (1887) 12
Beasley v. *United States*, 128 S. Ct. 1471 (2008) 19
Eberhart v. *United States*, 546 U.S. 12 (2005) 13, 14

Cases—Continued: Page

Harris v. *United States*, 149 F.3d 1304 (11th Cir. 1998) 10, 11, 18, 20
Insurance Corp. of Ireland v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) 20
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 12, 13
Massaro v. *United States*, 538 U.S. 500 (2003) 20
New York v. *Hill*, 528 U.S. 110 (2000) 15
Prou v. *United States*, 199 F.3d 37 (1st Cir. 1999) 15, 16, 17
Puckett v. *United States*, 129 S. Ct. 1423 (2009) 21
Quintanilla v. *United States*, 538 U.S. 926 (2003) 19
Reed v. *Ross*, 468 U.S. 1 (1984) 21
Sanchez-Llamas v. *Oregon*, 548 U.S. 331 (2006) 20
Sapia v. *United States*, 433 F.3d 212 (2d Cir. 2005) .. 14, 17
Severino v. *United States*, 540 U.S. 837 (2003) 19
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 12
United States v. *Belanger*, 970 F.2d 416 (7th Cir. 1992) 16
United States v. *Beasley*, 495 F.3d 142 (4th Cir. 2007), cert. denied, 128 S. Ct. 1471 (2008) 17
United States v. *Bryant*, 187 Fed. Appx. 134 (3d Cir. 2006), cert. denied, 549 U.S. 1293 (2007) 18
United States v. *Ceballos*, 302 F.3d 679 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 926, and 537 U.S. 939 (2003) 14, 17
United States v. *Cotton*, 535 U.S. 625 (2002) 11, 12, 15, 20, 23
United States v. *Dodson*, 288 F.3d 153 (5th Cir.), cert. denied, 537 U.S. 888 (2002) 18

Cases—Continued: Page

United States v. *Flowers*, 464 F.3d 1127 (10th Cir. 2006) 17
United States v. *Frady*, 456 U.S. 152 (1982) 20, 21
United States v. *Hill*, 142 F.3d 305 (6th Cir.), cert. denied, 525 U.S. 898 (1998) 16
United States v. *Jackson*, 121 F.3d 316 (7th Cir. 1997) .. 15
United States v. *Johnson*, 944 F.2d 396 (8th Cir.), cert. denied, 502 U.S. 1008 (1991), 502 U.S. 1078, and 504 U.S. 977 (1992) 15
United States v. *Mezzanatto*, 513 U.S. 196 (1995) 15
United States v. *Mooring*, 287 F.3d 725 (8th Cir.), cert. denied, 537 U.S. 864 (2002) 18
United States v. *Olano*, 507 U.S. 725 (1993) 20, 23
United States v. *Pritchett*, 496 F.3d 537 (6th Cir. 2007) 15, 17, 18
United States v. *Vanness*, 85 F.3d 661 (D.C. Cir. 1996) 18
United States v. *Williams*, 341 U.S. 58 (1951) 12
United States v. *Wright*, 932 F.2d 868 (10th Cir.), cert. denied, 502 U.S. 962, and 502 U.S. 972 (1991) ... 16

Statutes and rules:

18 U.S.C. 3231 ..... 12, 14, 17
21 U.S.C. 841(a)(1) 2, 4
21 U.S.C. 841(b)(1) 22
21 U.S.C. 841(b)(1)(A) 3, 5
21 U.S.C. 841(b)(1)(A)(iii) 2, 3, 5
21 U.S.C. 841(b)(1)(B) 5
21 U.S.C. 851 ..... 11, 15, 17, 18

Statutes and rules—Continued: Page

21 U.S.C. 851(a) ..... *passim*
21 U.S.C. 851(a)(1) 4, 21, 22
21 U.S.C. 851(b) 8
28 U.S.C. 2255 ..... 10, 20
Fed. R. App. P. 4(b)(1)(A) 10
Fed. R. Crim. P.:
Rule 11(e)(6) 15
Rule 33 ..... 13, 14
Rule 52(b) 20
Fed. R. Evid. 410 15

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2009. A petition for rehearing en banc was denied on March 30, 2009. (App., *infra*, 4a-5a). On June 19, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 28, 2009. On July 20, 2009, Justice Thomas further

extended the time to August 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 851 of Title 21 of the United States Code is reproduced in the appendix to this petition. App., *infra*, 53a-55a.

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Northern District of Florida of possessing with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). App., *infra*, 27a-42a. Respondent was sentenced to a mandatory term of life imprisonment because he had two prior felony drug convictions. *Id.* at 49a. See 21 U.S.C. 841(b)(1)(A)(iii). Concluding that the statutory requirements for imposition of the recidivism enhancement are "jurisdictional," the court of appeals vacated respondent's sentence and remanded for resentencing without the enhancement. App., *infra*, 1a-3a.

1. On April 9, 2006, officers responded to a traffic accident near an intersection in Springfield, Florida. Eyewitnesses told the officers that one of the drivers involved in the accident, later identified as respondent, fled the scene on foot carrying a small bag. A nearby resident reported to police that a male meeting the description of the fleeing driver had forded a canal and had then run through his yard while soaking wet. Presentence Report para. 6 (PSR).

A short time later, police arrested respondent inside a mobile home approximately three blocks from the site of the accident. Officers found a wet knapsack next to a broken window outside the home. A search of the knap-

sack revealed three plastic bags containing 31.8 grams of cocaine base, commonly known as crack. PSR para. 8.

Following his arrest, respondent asked to speak with federal law enforcement agents. In that conversation, respondent stated that he had been selling crack in the area for the past several months and that he typically received from his supplier four to six "cookies" of crack weighing approximately 18 grams each. He further stated that, on the day of his arrest, he had received six cookies of crack (totaling approximately 108 grams) and that he had sold all of it earlier that day except for the 31.8 grams police found in his knapsack. PSR para. 10.

2. On May 17, 2006, a federal grand jury in the Northern District of Florida returned an indictment charging respondent with one count of possessing with intent to distribute 50 grams or more of cocaine base. The indictment cited, among other provisions, 21 U.S.C. 841(b)(1)(A)(iii), which sets forth the relevant penalties for that offense. Under Section 841(b)(1)(A), a defendant with no prior convictions is subject to a statutory range of between ten years and life in prison; a defendant with a single prior conviction for a felony drug offense is subject to a statutory range of 20 years to life; and a defendant with two or more prior convictions for a felony drug offense "shall be sentenced to a mandatory term of life imprisonment without release." 21 U.S.C. 841(b)(1)(A)(iii).

3. Respondent has an extensive adult criminal history and a number of prior convictions, including two felony convictions for possession of cocaine. The first of those two convictions occurred on October 2, 2001, and the second occurred on February 6, 2003. Both were entered in the Circuit Court for Bay County, Florida. PSR paras. 38, 39.

On July 5, 2006, the government filed an information pursuant to 21 U.S.C. 851(a)(1) seeking a mandatory life sentence based on respondent's prior felony drug convictions. App., *infra*, 10a-11a. Section 851(a)(1) provides in relevant part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

The information was entitled "Notice of Enhancement" and contained three paragraphs. The first paragraph stated that the information served to "notif[y] the Court and the defendant * * * that the defendant is subject to the increased penalty provisions of Title 21, United States Code, Section 841(b)(1)(B), because of a previous conviction." The second paragraph identified respondent's prior convictions, stating that he "was convicted in the Circuit Court in Bay County, Florida, of the offense of Possession of a Controlled Substance (Cocaine) on two separate occasions in Case Number 01-1339 on January 21, 2003 and in Case Number 02-3149 on February 6, 2003." The third paragraph concluded by stating that "notice is given of the intention of the United States to invoke the increased penalty provisions under Title 21, United States Code, Section 841(b)(1)(B), against this defendant because of his prior felony convictions as outlined above." App. *infra*, 10a-11a.

The information contained two defects. First, it misstated the date of the first of respondent's two prior

drug convictions. The information listed that date as January 21, 2003, which was in fact the date on which respondent's home confinement was revoked for the offense. PSR para. 38. The correct date of the conviction is October 2, 2001. *Ibid.* Second, in the first and third paragraphs, the information incorrectly cited the enhanced penalty provisions in 21 U.S.C. 841(b)(1)(B), rather than 21 U.S.C. 841(b)(1)(A).

4. Respondent agreed to plead guilty to the single count in the indictment. App., *infra*, 17a-24a. On July 13, 2006, in anticipation of respondent's guilty plea, the government filed a pleading entitled "Statement of Facts and Elements of the Offenses," setting forth the factual basis for respondent's guilty plea, the elements of the offense, and the applicable penalties. *Id.* at 12a-16a. The "Penalties" section of that document correctly stated: "Enhanced possible penalties, based upon 2 prior felony cocaine convictions, are minimum mandatory life imprisonment, fine of up to $8 million; 10 years of Supervised Release, and a $100 [special monetary assessment]." *Id.* at 15a.

The same day, respondent signed a plea agreement and entered a guilty plea in open court. App., *infra*, 17a-25a. The written plea agreement documented that respondent had agreed to plead guilty to one count of possessing with intent to distribute 50 grams or more of crack "in violation of Title 21, United States Code, Section 841(b)(1)(A)(iii)." *Id.* at 18a. The plea agreement also specified that "[i]f the Court determines that [respondent] has two prior qualifying felony drug convictions under 21 U.S.C. §§ 841 and 851, * * * he faces a minimum mandatory term of Life imprisonment," among other penalties. *Ibid.*

During the plea hearing, the district court reviewed the penalties applicable to respondent's offense. The following exchange took place:

THE COURT: All right, Mr. Bowden, I need to now go over with you the maximum sentence that could be imposed. And you understand that if the government establishes that you have two prior convictions for felony drug offense, that you are looking at an enhanced sentence.

[RESPONDENT]: Yes, sir.

THE COURT: If the government can establish enhancement for two prior convictions of felony drug offense, the maximum penalty would be a mandatory term of life imprisonment without release, and a term of supervised release of at least ten years, a fine in the amount of $8 million, a special monetary assessment of $100, and forfeiture of all forfeitable assets to the United States. Do you understand that that is the maximum sentence that could be imposed.

[RESPONDENT]: Yes, sir.

App., *infra*, 34a-35a. Following additional discussion, the district court accepted respondent's guilty plea, finding it freely and voluntarily made with the advice of

competent counsel, and adjudicated him guilty. *Id.* at 39a-40a. Before the proceeding concluded, however, the court confirmed once more that respondent was aware of, and had discussed with his lawyer, the fact "that the government has filed a notice of enhancement in this case because it contends that you have two prior felony drug convictions." *Id.* at 40a.

5. The probation office prepared a presentence investigation report identifying respondent's prior convictions, including the two drug felony convictions the government had cited in the information it filed pursuant to Section 851(a). PSR para. 43. Paragraph 38 of the PSR described the first of those two convictions, stating that respondent had "[p]leaded nolo contendere, adjudicated guilty as to all counts" on "10/2/01." PSR para. 38. That paragraph also stated that, on "1/21/03," respondent had his "community control" (*i.e.*, house arrest) revoked and was sentenced to an additional four years of probation.

The PSR recounted that "[o]n July 5, 2006, the government filed a Notice of Enhancement advising the government's intent to seek enhanced penalties for [respondent], detailing his convictions for two prior felony drug offenses." PSR para. 3. Describing that notice, the PSR stated that "[t]he enhancement exposes [respondent] to a minimum mandatory term of Life imprisonment, ten (10) years supervised release, an $8,000,000 fine, and a $100 special monetary assessment." *Ibid.* The PSR then set out the applicable penalties to "reflect the enhancement information filed by the government," noting that "[t]he minimum term of imprisonment for the offense of conviction is Life Imprisonment, pursuant to 21 U.S.C. § 841(b)(1)(A)." PSR para. 67. Respondent did not file any objections to the PSR.

6. At the outset of respondent's sentencing proceeding on October 11, 2006, the court confirmed that respondent's counsel had no objections to the PSR. App., *infra*, 45a-46a. The court then asked respondent if he had "any questions about that report or any objections which [he] would like to state," to which respondent replied "[n]o, sir." *Id.* at 46a. After hearing from counsel, *id.* at 46a-47a, the court advised respondent of the "need to have a conversation now about the notice of enhancement," *id.* at 47a. Respondent reiterated that he was "aware" the enhancement had been filed. *Ibid.* The court then explained that it would ask respondent either to affirm or deny the fact of his prior convictions. *Ibid.*; see 21 U.S.C. 851(b) (stating that, in cases where an information is filed, "the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence"). Respondent stated that he understood, App., *infra*, 47a, at which point the following exchange took place:

> THE COURT: Now the notice of enhancement states that you were convicted in the Circuit Court for Bay County on two separate occasions of the offense of possession of a controlled substance, cocaine, in case No. 01-1339, on January 21, 2003, and in case 02-3149 on February 6th, 2003. Now, do you deny or do you af-

firm that you were in fact convicted on those two occasions as stated?

[RESPONDENT]: Sir, you say February 3, 2006?

THE COURT: February 6th, 2003.

[RESPONDENT]: I was in jail then.

[COUNSEL]: Your Honor, if I could have a minute, please.

Id. at 48a. Following a conversation off the record between respondent and his counsel, the prosecutor suggested that

> what may be confusing is [respondent] got a—in the original case, reflected in the presentence report at paragraph 38, he originally got placed on community control and then he violated that. And then January 21st of '03 his community control was revoked and he got 40 months of Department of Corrections. And then the following month, February 6th of '03, is when he pled nolo to the other possession of cocaine charge, but those were separate offenses, separate dates, and that may be what confused him.

Ibid.

The court asked respondent whether he was "satisfied" and that he "understand[s] now what we're talking about," to which respondent replied "[y]es, sir." App., *infra*, 48a-49a. The court then asked respondent "[d]o you admit or do you deny that you were convicted as stated on those two prior occasions?" *Id.* at 49a. Respondent answered, "I admit." *Ibid.*

The district court sentenced respondent to life imprisonment. App., *infra*, 49a. After the court pro-

nounced that sentence, it asked counsel if there were "any objections to [its] ultimate findings of fact or conclusions of law relating to this sentence." *Id.* at 51a. Respondent's counsel stated that he had "[n]o objections" but requested that the court recommend to the Bureau of Prisons that respondent be placed in a long-term substance abuse program. *Ibid.* Counsel again reiterated that he had no objections to the manner in which the court imposed sentence, *id.* at 52a, and the hearing concluded, *ibid.*

7. On appeal, respondent argued for the first time that, as a result of the date and citation errors in the Section 851(a) information, "the district court did not have jurisdiction to impose an enhanced sentence of mandatory life imprisonment." Resp. C.A. Br. 11.[1]

The court of appeals agreed, vacating respondent's sentence and remanding for resentencing without the enhancement from his prior convictions. App., *infra*, 1a-3a. The court determined that the information filed by the government "did not strictly comply" with the requirements of Section 851(a). *Id.* at 1a. The court then held, in accord with circuit precedent, that as a result of the government's non-compliance with Section 851(a) "the district court lacked jurisdiction to enhance [respondent's] sentence." *Id.* at 3a.; see *Harris* v. *United*

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[1] Respondent did not file a notice of appeal from the judgment of conviction within the time allotted. See Fed. R. App. P. 4(b)(1)(A). Several months later, respondent filed a notice of appeal, which the court of appeals dismissed as untimely. Respondent then filed a motion under 28 U.S.C. 2255, claiming in part that he had instructed his trial counsel to file a timely notice of appeal and that counsel's failure to do so was constitutionally ineffective. The district court granted that motion and entered a new judgment, from which respondent timely appealed. Gov't C.A. Br. 2-3.

States, 149 F.3d 1304 (11th Cir. 1998) (holding that a district court lacks jurisdiction to impose an enhanced sentence when the government fails to comply with Section 851).

The government filed a petition for rehearing en banc, arguing that, in light of recent decisions of this Court, the court of appeals should revisit and overrule its precedents treating the requirements of Section 851(a) as "jurisdictional." The Eleventh Circuit denied that petition. App., *infra*, 4a-5a.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals applied its holding in *United States* v. *Harris*, 149 F.3d 1304 (1998), that the government's failure to file a notice in full compliance with the requirements of 21 U.S.C. 851(a) divests a district court of "jurisdiction" to impose an enhanced sentence on a recidivist drug offender. That decision conflicts with the decisions of all eight other courts of appeals to address the issue. Those courts have held that Section 851(a)'s requirements are not "jurisdictional" and thus, like other procedural rights, may be forfeited or waived if not timely asserted by the defendant. The decision below also conflicts with decisions of this Court—most notably *United States* v. *Cotton*, 535 U.S. 625 (2002)—that have clarified and limited the meaning of the term "jurisdictional." Because the question presented is an important and recurring one in federal prosecutions and is squarely presented in this case, this Court's review is warranted.

A. The Decision Of The Court Of Appeals Is Incorrect

The court of appeals erred in adhering to its view that the requirements of Section 851(a) are "jurisdictional" and therefore must be noticed on appeal or col-

lateral review regardless whether they were timely raised in the district court. Because Section 851(a) does not affect a court's power to entertain the case, its notice requirements are properly characterized as claim-processing rules that the defendant may forfeit by failing to make a contemporaneous objection in the district court.

1. This Court has recently clarified that the term "jurisdictional" carries a limited and specific meaning. In *United States* v. *Cotton*, *supra*, the Court held that defects in an indictment, including the omission of an element of the offense, do not constitute "jurisdictional" error. The Court overruled its previous decision in *Ex parte Bain*, 121 U.S. 1 (1887), to the extent that it held otherwise. *Cotton*, 535 U.S. at 630. The Court reasoned that *Bain* rested on an "elastic concept of jurisdiction [that] is not what the term 'jurisdiction' means today." *Ibid.* The modern, correct understanding of that term, the Court explained, refers only to a federal court's "statutory or constitutional *power* to adjudicate the case.'" *Ibid.* (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). The court observed that, in the criminal context, a federal court acquires such power by statutory authorization over offenses against the United States, see 18 U.S.C. 3231, and the court does not lose "jurisdiction" because of an error in the institution of the proceeding. *Cotton*, 535 U.S. at 631 (citing *United States* v. *Williams*, 341 U.S. 58, 66 (1951)).

Later decisions have reaffirmed that the term "jurisdiction" refers to a court's power to hear a dispute. In *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), the Court explained that, for many years, federal courts "ha[d] been less than meticulous" in their use of the word, "more than occasionally us[ing] the term 'jurisdictional' to de-

scribe emphatic time prescriptions in rules of court." *Id.* at 454; see *ibid.* ("'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'") (quoting *Steel Co.*, 523 U.S. at 90). The Court drew a distinction between "claim-processing rules" that govern the conduct of litigation and true "jurisdictional" rules that "delineate what cases * * * courts are competent to adjudicate" in the first instance. *Ibid.*

The Court emphasized that the imprecise use of the term "jurisdictional" overlooked a central feature of that concept. *Kontrick*, 540 U.S. at 456. "[A] court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Ibid.* Because of that "critical difference," *ibid.*, the Court observed that, in the future, "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* at 455.

In *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam), this Court applied *Kontrick* to summarily reverse a court of appeals decision treating as "jurisdictional" the time limits in Federal Rule of Criminal Procedure 33 for seeking a new trial. The Court again noted the "less than meticulous uses of the term 'jurisdictional' in [its] earlier cases," observed that "recent decisions have attempted to brush away [the] confusion introduced" by those rulings, and reemphasized *Kontrick*'s admonition that courts should reserve the "jurisdictional" label for limitations on the "classes of cases"

or "persons" within the court's power to adjudicate. *Id.* at 16. Applying those precepts, the Court reasoned that, because Rule 33 is a "claim-processing" rule rather than a "jurisdictional" one, the government could not oppose a new trial motion on untimeliness grounds where it had failed to assert that rule at the appropriate time. *Id.* at 19.

2. Under *Cotton*, *Kontrick*, and *Eberhart*, the notice requirements in Section 851(a) are not "jurisdictional" requirements as that term is properly understood. The jurisdiction of district courts to hear criminal cases rests on 18 U.S.C. 3231. Once a district court has acquired such jurisdiction, neither that statute nor any other purports to divest it of jurisdiction simply because of a statutory or rule violation in adjudicating the case. Just as a court does not lose power to adjudicate a case because of an error in the indictment initiating the proceeding, see *Cotton*, so too the court does not lose power to impose a sentence because of a defect in an information filed under Section 851(a). As every court of appeals other than the Eleventh Circuit to address the issue has concluded, "[Section] 851 simply 'has nothing to do with [a court's] subject-matter jurisdiction' over a criminal case or a court's general power to impose a sentence." *Sapia* v. *United States*, 433 F.3d 212, 217 (2d Cir. 2005) (quoting *United States* v. *Ceballos*, 302 F.3d 679, 692 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137, 538 U.S. 926, and 538 U.S. 939 (2003)); see pp. 16-18, *infra*.

The purposes of Section 851 underscore that it is not a jurisdictional requirement. Section 851 is principally intended to provide a defendant with notice and an opportunity to be heard respecting a recidivist enhancement, in part so that he can challenge any prior convic-

tion on which it is based. *United States* v. *Pritchett*, 496 F.3d 537, 548 (6th Cir. 2007); *United States* v. *Jackson*, 121 F.3d 316, 319 (7th Cir. 1997). Section 851 "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Prou* v. *United States*, 199 F.3d 37, 44 (1st Cir. 1999) (quoting *United States* v. *Johnson*, 944 F.2d 396, 407 (8th Cir.), cert. denied, 502 U.S. 1008 (1991), 502 U.S. 1078, and 504 U.S. 977 (1992)). Section 851 thus protects a defendant's individual rights; it does not serve to limit the class of cases over which a court has cognizance.

Because Section 851 is not jurisdictional, its requirements are subject to the ordinary rule that a defendant can waive or forfeit the protections of a statutory or regulatory provision by failing to assert them at the appropriate time. See, *e.g.*, *New York* v. *Hill*, 528 U.S. 110 (2000) (Interstate Agreement on Detainers statute); *United States* v. *Mezzanatto*, 513 U.S. 196 (1995) (plea bargaining statements under Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410). See *Prou*, 199 F.3d at 47 ("Because [S]ection 851(a)(1)'s temporal requirements exist for the defendant's benefit, it makes perfect sense to give the defendant the power to waive (and the obligation not to forfeit) strict compliance with them."); see also *Cotton*, 535 U.S. at 631 ("Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim.")

B. The Court Of Appeals' Decision Solidifies An Existing Conflict Among The Circuits

The decision below entrenches a conflict between the Eleventh Circuit and eight other courts of appeals on the question presented. The Eleventh Circuit's refusal to reconsider its erroneous position in light of the overwhelming weight of contrary authority warrants this Court's intervention.

1. Before this Court's decision in *Cotton*, the law in the courts of appeals was unsettled on the consequences of the government's non-compliance with Section 851(a). At least three courts of appeals—the Sixth, Seventh, and Tenth Circuits—agreed with the Eleventh Circuit's view in *Harris* that "a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of [Section] 851." *Harris*, 149 F.3d at 1306; see *United States* v. *Hill*, 142 F.3d 305, 312 (6th Cir.) ("Section 851(a)(1) imposes a jurisdictional requirement granting the district court jurisdiction to enhance a defendant's sentence."), cert. denied, 525 U.S. 898 (1998); *United States* v. *Belanger*, 970 F.2d 416, 418 (7th Cir. 1992) ("Failure to file the notice prior to trial deprives the district court of jurisdiction to impose an enhanced sentence."); *United States* v. *Wright*, 932 F.2d 868, 882 (10th Cir.) ("Failure to file the information prior to trial deprives the district court of jurisdiction to impose an enhanced sentence."), cert. denied, 502 U.S. 962, and 502 U.S. 972 (1991).

The First Circuit, by contrast, squarely rejected the Eleventh Circuit's position after careful analysis. Acknowledging the confusion in the case law over the proper characterization of Section 851(a), the First Circuit held in *Prou* v. *United States*, *supra*, that the "jurisdictional" characterization was incorrect. 199 F.3d at

41-45. The court of appeals reasoned that, regardless of whether the government complies with Section 851(a), "a federal district court plainly possesses subject-matter jurisdiction over drug cases" under 18 U.S.C. 3231, including the power to impose penalties, and "[o]nce subject-matter jurisdiction has properly attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Prou*, 199 F.3d at 45.

2. Following the decision in *Cotton*, every court of appeals to consider the issue has aligned itself with the First Circuit and disagreed with the Eleventh. Based on this Court's recent precedents, the Sixth, Seventh, and Tenth Circuits have "expressly overrule[d]" their previous decisions adopting the Eleventh Circuit's view. *United States* v. *Flowers*, 464 F.3d 1127, 1130 (10th Cir. 2006) (holding that, because Section 851 is not jurisdictional, it can be waived or forfeited by the defendant); see *Ceballos*, 302 F.3d at 692 ("[T]oday we hold that [Section] 851(a)'s procedural requirements are not jurisdictional, and our prior cases holding otherwise are expressly overruled on that issue"; reasoning that "[Section] 851 has nothing to do with subject-matter jurisdiction, as the Supreme Court has defined that term in *Cotton*."); *Pritchett*, 496 F.3d at 544-547 (same). The Second, Fourth, Fifth, and Eighth Circuits also agree that Section 851 does not concern the district court's "jurisdiction" to impose an enhanced sentence. See *United States* v. *Beasley*, 495 F.3d 142, 147-148 (4th Cir. 2007) (concluding that a forfeited claim of error under Section 851 is reviewable on appeal only for plain error because the requirements of that statute are not "jurisdictional"), cert. denied, 128 S. Ct. 1471 (2008); *Sapia*, 433 F.3d at 216-217 (holding that, because Section 851 is not jurisdictional, it could be procedurally defaulted); *Uni-*

ted States v. *Dodson*, 288 F.3d 153, 159-160 & n.9 (5th Cir.) (reviewing unpreserved Section 851 claim for plain error after concluding that the statute is not jurisdictional), cert. denied, 537 U.S. 888 (2002); *United States* v. *Mooring*, 287 F.3d 725, 726-728 (8th Cir.) (applying rules of procedural default to Section 851 claim raised for the first time on collateral review), cert. denied, 537 U.S. 864 (2002); see also *United States* v. *Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996) (rejecting the "jurisdictional" label and concluding that the filing of an information is "simply a necessary condition" to imposition of enhanced sentence).[2]

Accordingly, the Eleventh Circuit now stands alone among the courts of appeals in adhering to its pre-*Cotton* view that compliance with Section 851(a) is a "jurisdictional" requirement. See, *e.g.*, *Pritchett*, 496 F.3d at 546 ("The only circuit holding that the [S]ection 851(a)(1) requirements are jurisdictional is the Eleventh.") (citing *Harris*, 149 F.3d at 1306).

3. The Eleventh Circuit has repeatedly declined invitations to reconsider its position. The government filed a petition for rehearing en banc in *Harris*, asking the full court to review the issue at that time, but the petition was denied. The government filed another petition for rehearing en banc in this case, which was also denied.

The government has opposed petitions for a writ of certiorari in several cases presenting this issue on the

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[2] Neither the Ninth Circuit nor the Third Circuit has squarely addressed the proper characterization of Section 851(a). The latter court has noted, however, that "a majority of courts to have considered the issue have found that the requirements of § 851 are not 'jurisdictional.'" *United States* v. *Bryant*, 187 Fed. Appx. 134 (3d Cir. 2006), cert. denied, 549 U.S. 1293 (2007).

ground that, after *Cotton*, the courts of appeals could be expected to resolve the conflict on their own. See Br. in Opp., *Severino* v. *United States*, 540 U.S. 837 (2003) (No. 02-10095); Br. in Opp., *Quintanilla* v. *United States*, 538 U.S. 926 (2003) (No. 02-7455). Most recently, in opposing certiorari in *Beasley* v. *United States*, 128 S. Ct. 1471 (2008), the government noted that although the Eleventh Circuit had not yet joined the position adopted by its sister circuits, that court "should be given an opportunity to reconsider its ruling in *Harris* before this Court grants review on this issue." Br. in Opp. at 13-14, *Beasley*, *supra* (No. 07-548).

The government's petition for rehearing en banc in this case gave the Eleventh Circuit that opportunity. By denying en banc review, the Eleventh Circuit has made clear that it is unwilling to revisit its interpretation of Section 851(a). This Court's intervention is therefore now necessary.

C. The Question Presented Is Important And Squarely Implicated In This Case

1. The question presented is important to the administration of the federal criminal justice system. Whether the requirements of Section 851(a) are deemed "jurisdictional" determines the applicable legal framework in the situation exemplified by this case: A defendant fails in the district court to allege noncompliance with Section 851(a), is sentenced to an enhanced term, then attempts for the first time on appeal or collateral review to invoke the requirements of that provision as a basis for invalidating the enhanced sentence.

a. Under the majority position, which treats the requirements of Section 851(a) like other procedural rules subject to forfeiture and procedural default, a defen-

dant's failure to preserve a challenge to the information significantly limits his ability later to attack his sentence. Review on appeal would be for plain error under Federal Rule of Criminal Procedure 52(b), and the defendant could therefore prevail only if, among other things, the defect in the information affected his "substantial rights." *United States* v. *Olano*, 507 U.S. 725 (1993). Similarly, on collateral review, a defendant pressing an unpreserved claim of error under Section 851(a) would be required to demonstrate "both 'cause' for not raising the claim at trial, and 'prejudice' from not having done so." *Sanchez- Llamas* v. *Oregon*, 548 U.S. 331, 351 (2006) (quoting *Massaro* v. *United States*, 538 U.S. 500, 504 (2003)); *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982).

Under the Eleventh Circuit's rule, by contrast, settled principles of forfeiture, waiver, and procedural default would not apply. Because subject-matter jurisdiction "involves a court's power to hear a case," "defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *Cotton*, 535 U.S. at 630; see *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Accordingly, in the Eleventh Circuit, a defendant can obtain automatic invalidation of an enhanced sentence based on a technical defect in the information raised for the first time on appeal or habeas, without justifying his failure to raise the issue in the district court or showing that the error prejudiced him in any way. Indeed, that is precisely what happened in this case. See *Harris*, 149 F.3d at 1308-1309 (granting relief under 28 U.S.C. 2255 based on previously unasserted claim of non-compliance with Section 851(a); rea-

soning that jurisdictional errors cannot be waived, forfeited, or defaulted on collateral review).

b. That result conflicts with basic principles of fairness and efficiency in judicial practice. The plain-error standard on direct review and rules of procedural default on collateral review serve important functions: They further the public interest in the finality of criminal judgments, see *Frady*, 456 U.S. at 166, "induce the timely raising of claims and objections," provide the district court with "the opportunity to consider and resolve" disputes it is in the best position to adjudicate, permit the court and the parties to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome," and prevent a litigant from "'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor," *Puckett* v. *United States*, 129 S. Ct. 1423, 1428 (2009); see *Reed* v. *Ross*, 468 U.S. 1, 10 (1984) (procedural default rules "channel[], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently").

The Eleventh Circuit's characterization of Section 851(a)'s requirements as "jurisdictional" frustrates each of those objectives. Indeed, the concerns animating contemporaneous objection rules are particularly acute in this context. The government can readily correct errors in an information if those defects are brought to light at the appropriate time, because Congress specifically provided in Section 851(a) that "[c]lerical mistakes in the information may be amended at any time prior to the pronouncement of sentence." 21 U.S.C. 851(a)(1). The government has no recourse, however, if an appellate or habeas court invalidates on purportedly "jurisdictional"

grounds an enhanced sentence imposed years earlier. Under the decision below, a defendant therefore may permanently escape enhanced punishment under 21 U.S.C. 841(b)(1) simply by remaining silent at sentencing and raising a defect in an information for the first time on appeal or in a habeas petition.

The Eleventh Circuit's position also runs contrary to congressional intent. By authorizing higher statutory penalties for recidivist offenders, Congress provided the federal government with an important tool in combating drug trafficking. Congress conditioned the imposition of those increased sentences upon notice by the government pursuant to the procedures set forth in Section 851(a). But there is no reason to believe that Congress intended to vitiate that scheme when, because of prosecutorial oversight, an information filed under Section 851(a) contains easily corrected errors that cause the defendant no prejudice and to which he did not object. Indeed, the provision in Section 851(a)(1) permitting amendment of "clerical mistakes in the information * * * at any time" prior to sentencing (and thus after adjudication of guilt) strongly suggests that Congress did not intend that result. 21 U.S.C. 851(a)(1).

2. This case squarely presents the conflict among the courts of appeals on the question presented. Although respondent raised his claim under Section 851(a) for the first time on appeal, the Eleventh Circuit did not apply plain-error review, but instead invalidated respondent's enhanced sentence on the ground that "the district court lacked jurisdiction" to impose it. App., *infra*, 1a. The outcome and analysis would have been different in the courts of appeals that do not treat the requirements of Section 851(a) as "jurisdictional." Those courts would have applied plain-error review, requiring respon-

dent to show, *inter alia*, that the alleged defects in the information "affec[ted his] substantial rights" by causing him prejudice and also "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732.

Respondent could not satisfy either of those showings. He cannot establish prejudice because he was correctly and repeatedly advised—by the government and the court, orally and in writing, before and after his guilty plea—that he faced a mandatory life sentence if the court found that he had two prior felony drug convictions. Despite the defects in the information, respondent acknowledged that he understood that possibility. And, at sentencing, respondent admitted the fact of his two prior convictions and confirmed his awareness that those convictions were the basis for his enhanced sentence. See pp. 8-9, *supra*. For those reasons, the defects in the information also did not "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. As in *Cotton*, the "real threat" to the fairness and integrity of the proceedings is the outcome in the court of appeals, which required that respondent receive a sentence far less than that mandated by law because of a non-prejudicial error that he never raised in the district court. *Cotton*, 535 U.S. at 634.

3. This Court may wish to consider summary reversal as an alternative to plenary review. The decision below is clearly incorrect and rests on a position that conflicts with decisions of this Court. This Court's decision in *Eberhart*, which confirmed the distinction between "jurisdictional" and "claim-processing rules" that controls this case, was itself a summary disposition. In view of the unanimity among the other courts of appeals

to address this question, summary reversal may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted. The court may also wish to consider summary reversal of the judgment below.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAVID A. O'NEIL
Assistant to the Solicitor General
MICHAEL A. ROTKER
Attorney

AUGUST 2009

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11935
Non-Argument Calendar

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MIKOLA MAURICE BOWDEN, DEFENDANT-APPELLANT

Jan. 7, 2009

PER CURIAM:

Appellant Mikola Maurice Bowden appeals his sentence of mandatory life imprisonment based on his conviction for possession with intent to distribute more than 50 grams of a mixture and substance containing cocaine base, 21 U.S.C. § 841(a)(1), (b)(1)(A)(iii), and 2 prior felony drug convictions, 21 U.S.C. §§ 841(b)(1)(A), 851(a)(1). On appeal, Bowden argues that the district court lacked jurisdiction to enhance his sentence because the government's notice of enhancement did not strictly comply with the requirements of 21 U.S.C. § 851(a)(1), because it listed one wrong conviction date and the wrong enhancement statute.[1]

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[1] Bowden's additional argument that the U.S. Supreme Court wrongly decided *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), fails but remains preserved. *See United*

We review the adequacy of a 21 U.S.C. § 851 notice of enhancement *de novo*. *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007). Section 851(a)(1) states in part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.
>
> Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

21 U.S.C. § 851(a)(1).

We require strict compliance with the procedural and substantive requirements of § 851(a)(1) notices. *See United States v. Rutherford*, 175 F.3d 899, 904 (11th Cir. 1999); *United States v. Olson*, 716 F.2d 850, 852-53 (11th Cir. 1983); *United States v. Noland*, 495 F.2d 529, 530 (5th Cir. 1974).[2] When a notice of enhancement contains

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States v. Lindsey, 482 F.3d 1285, 1294 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 438 (2007).

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

minor errors we will find § 851 compliance as long as the notice, despite the errors, unambiguously signal the government's intent. *See Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001).

Here, the record demonstrates that the government's information did not unambiguously signal to Bowden that it sought mandatory life imprisonment when the information cited a statute that imposed only a ten-year mandatory minimum term of imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)-(B); *Perez*, 249 F.3d at 1266-67. In addition, the government failed to clearly indicate "the previous convictions to be relied upon" when it listed as Bowden's first Possession of a Controlled Substance conviction date not the actual date of conviction, but rather a date on which another adverse action was taken against Bowden in the same-numbered case. *See* 21 U.S.C. § 851(a)(1). Therefore, the notice of enhancement did not strictly comply with § 851(a)(1) and the district court lacked jurisdiction to enhance Bowden's sentence. We vacate and remand for re-sentencing without the enhancement.

AFFIRMED in part, VACATED AND REMANDED in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11935-EE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MIKOLA MAURICE BOWEN, DEFENDANT-APPELLANT

[Filed: Mar. 30, 2009]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BEFORE: DUBINA, MARCUS and ANDERSON, Circuit Judges

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

5:06cr46/RS

UNITED STATES OF AMERICA

v.

MIKOLA MAURICE BOWDEN

[Filed: May 17, 2006]

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

That on or about April 9, 2006, in the Northern District of Florida, the defendant,

MIKOLA MAURICE BOWDEN,

did knowingly and intentionally possess with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1), and that this offense involved fifty (50) grams or more of a mixture and

substance containing cocaine base, commonly known as "crack cocaine," in violation of Title 21, United States Code, Section 841(b)(1)(A)(iii).

Returned in open court pursuant to Rule 6(f)
5-17-06
Date

/s/ MIKE DAVIS

CRIMINAL FORFEITURE

The allegations contained in Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 21, United States Code, Section 853.

From his engagement in the violation alleged in Count One of this Indictment, punishable by imprisonment for more than one year, the defendant,

MIKOLA MAURICE BOWDEN,

shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853(a)(1) and (2), all of his interest in:

A. Property constituting or derived from any proceeds the defendant obtained directly or indirectly as the result of such violation; and

B. Property used in any manner or part to commit or to facilitate the commission of such violation.

If any of the property subject to forfeiture as a result of any act or omission of the defendant:

A. cannot be located upon the exercise of due diligence;

B. has been transferred or sold to, or deposited with, a third person;

C. has been placed beyond the jurisdiction of this Court;

D. has been substantially diminished in value; or

E. has been co-mingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeiture property.

All in violation of Title 21, United States Code, Section 853.

A TRUE BILL:

[Redacted per Privacy Policy]
FOREPERSON

5/16/06
DATE

GREGORY R. MILLER
GREGORY R. MILLER
United States Attorney

RANDALL J. HENSEL
RANDALL J. HENSEL
Assistant United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Case Number: 5:06CR46/RS

UNITED STATES OF AMERICA

v.

MIKOLA MAURICE BOWDEN

July 5, 2006

NOTICE OF ENHANCEMENT

COMES NOW the United States of America, by and through the undersigned Assistant United States Attorney, and pursuant to Title 21, United States Code, Section 851, files this enhancement information, hereby notifying the Court and the defendant, that the defendant is subject to the increased penalty provisions of Title 21, United States Code, Section 841(b)(1)(B), because of a previous conviction. In support thereof, the United States alleges as follows:

Mikola Maurice Bowden, the defendant, was convicted in the Circuit Court in Bay County, Florida, of the offense of Possession of Controlled Substance (Cocaine) on two separate occasions in Case Number 01-1339 on January 21, 2003 and in Case Number 02-3149 on February 6, 2003.

WHEREFORE, notice is given of the intention of the United States to invoke the increased penalty provisions under Title 21, United States Code, Section 841(b)(1)(B), against this defendant because of his prior felony convictions as outlined above.

RESPECTFULLY SUBMITTED this 5th day of July 2006, at Pensacola, Florida.

GREGORY R. MILLER
United States Attorney

/s/ RANDALL J. HENSEL
RANDALL J. HENSEL
Florida Bar No. 301604
Asst. U.S. Attorney
21 East Garden Street, Suite 400
Pensacola, FL 32502-5675
Phone: (850) 444-4000
Fax: (850) 434-0329

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading has been sent to Christopher Patterson, attorney for Defendant Mikola Maurice Bowden, via the Northern District of Florida Case Management/Electronic Case Filing (CM/ECF) program or mailed to 335 Magnolia Avenue, Panama City, Florida, 32401 on this 5th day of July 2006.

/s/ RANDALL J. HENSEL
RANDALL J. HENSEL
Assistant U.S. Attorney

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CASE: 5:06cr46/RS

UNITED STATES OF AMERICA

v.

MIKOLA MAURICE BOWDEN

June 22, 2006

STATEMENT OF FACTS AND ELEMENTS OF THE OFFENSES

COUNT ONE:

On April 9, 2006, defendant, Mikola Bowden, was a driver of one of the vehicles involved in a traffic crash near the intersection of Transmitter Road and East 4th Street in Springfield, a suburb of Panama City. Springfield Police Department Officers responded to the 911 report of the crash and on arrival, learned from eye witnesses that one of the drivers of one of the vehicles, later identified as the defendant, Mikola Bowden, has fled the scene on foot, carrying a small type bag. Officers received a 911 emergency services call from a nearby 4th Street resident, who advised a black male meeting the

description of the fleeing driver officers had received, had ran through his yard after fording a nearby canal and was soaking wet.

A short time later, Springfield Police Department (SPD) received another 911 call from a young female, reporting she was home alone and someone had broken into her mobile home through a glass window, and at the time of the phone call, she was hidden inside a closet in the trailer, unaware of how many and where the intruders were located. SPD officers responded to the scene, lot 35, 700 Transmitter Road, located approximately 3 blocks from the site of the traffic crash. SPD officers found a broken window at the rear of the mobile home and inside, a wet black nap sack by the broken window. The officers cleared the residence, escorting the 911 caller from her hiding place. The officers then heard sounds from a second locked bedroom in the trailer, and after receiving no response from the occupant to open the door, forcibly entered and found the defendant, Mikola Bowden, in the process of changing clothing. Wet clothing recovered from the floor of the bedroom where Bowden was found matched the description of what the fleeing driver was wearing.

SPD officers collected the black nap sack and found it contained three plastic bags of crack cocaine. The crack cocaine field tested positive for cocaine and has been submitted to the DEA lab for analysis and weighs 31.8 grams. SPD officers retrieved $350 from the nap sack, as well as an additional $124 from the wet trousers found in the bedroom when Bowden was apprehended. Investigation determined Bowden shared the mobile home with his girlfriend, Angela Monford, and it was her car he was operating at the time of the traffic crash.

Recorded statements from witnesses to the auto crash were taken by SPD officers. According to the witnesses statements after the crash, when the dust had settled and the smoke cleared, witnesses approached defendant to see if he was alright, and when he exited his car, he reached in the car and got a black nap sack, and walked down the sidewalk as if to check on the occupants of the other car involved in the accident, but walked on past it, down the sidewalk and then began running away. The wet clothing recovered from the bedroom was taken back to eye witnesses at the scene, and was positively identified as the clothing they had seen the driver wearing at the time he fled.

According to DEA Task Force Officer Robert Duncan, after Bowden's arrest on April 9, 2006, Bowden conveyed through a Panama City narcotic's investigator that the defendant wanted to talk to the "feds." Task Force Officer Duncan, accompanied by Ryan Robbins—another Bay County narcotics investigator—interviewed the defendant at the jail on April 19, 2006. Per Duncan, after confirming the defendant's desire to talk to them and him executing a waiver of rights form, Bowden admitted to Duncan that since the week after Thanksgiving, he had been receiving usually four cookies weighing approximately 18 grams of crack from his source of supply which Bowden was selling in the Panama City area. Bowden admitted on some occasions, he received six cookies at a time, and had obtained six 18 gram cookies from his source of supply on the day of his arrest, and what was seized from the nap sack was what Bowden had left of those six cookies from sales earlier in the day.

ELEMENTS OF THE OFFENSES:

Count One:

Under ECCA Jury Instruction 85, a violation of 21 U.S.C. 841 (a)(1), possession with intent to distribute cocaine in excess of 50 grams, requires proof of the following facts beyond a reasonable doubt:

1. That the defendant knowingly and willfully possessed cocaine base as charged;
2. That the defendant possessed the substance with intent to distribute it; and
3. The weight of the cocaine base possessed by the defendant was in excess of the 50 grams of the cocaine base, as charged.

PENALTIES:

Count One:

Possession with intent to distribute cocaine base over 50 grams in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(A)(iii). Penalties are 10 to life imprisonment, fine up to $2 million, up to 5 years of Supervised Release; and a $100 SMA. Enhanced possible penalties, based upon 2 prior felony cocaine convictions, are minimum mandatory life imprisonment, fine of up to $8 million; 10 years of Supervised Release, and a $100 SMA.

Respectfully submitted this 22nd day of June, 2006

GREGORY R. MILLER
United States Attorney

/s/ RANDALL J. HENSEL
RANDALL J. HENSEL
Assistant United States Attorney
Florida Bar # 301604
21 East Garden Street, Suite 400
Pensacola, FL 32501
(850) 444-4000

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHEN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CASE: 5:06cr46/RS

UNITED STATES OF AMERICA

v.

MIKOLA MAURICE BOWDEN

[Filed: July 13, 2006]

PLEA AND COOPERATION AGREEMENT

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1. PARTIES TO AGREEMENT

This agreement is entered into by and between MIKOLA MAURICE BOWDEN, Christopher Patterson, Esq., attorney for MIKOLA MAURICE BOWDEN;

and,

the United States Attorney for the Northern District of Florida. This agreement specifically excludes and does not bind any other state or federal agency, including other United States Attorneys and the Internal Revenue Service, from asserting any civil, criminal or administrative claim against MIKOLA MAURICE BOWDEN.

2. TERMS

The parties agree to the following terms:

a. MIKOLA MAURICE BOWDEN will plead guilty to Count One of the Indictment. Count One charges defendant with possession with the intent to distribute a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(l), and that this offense involved fifty (50) grams or more of a mixture and substance containing cocaine base, commonly known as "crack cocaine," in violation of Title 21, United States Code, Section 841(b)(1)(A)(iii).

If the Court determines that the defendant has two prior qualifying felony drug convictions under 21 U.S.C. §§841 and 851, on Count One he faces minimum mandatory term of Life imprisonment, $8,000,000 fine, ten year terms of supervised release, and a $100 special monetary assessment. If the Court determines that defendant does not have a prior qualifying felony drug conviction under 21 U.S.C. § §841 and 851, on Count One he faces ten years to Life imprisonment, five years supervised release, $4,000,000.00 fine, and $100 special monetary assessment. MIKOLA MAURICE BOWDEN agrees to pay the special monetary assessment on or before the date of sentencing.

b. Defendant is pleading guilty because MIKOLA MAURICE BOWDEN is in fact guilty of the charges contained in Count One in the Indictment. In pleading guilty to this offense, defendant acknowledges that were this case to go to trial, the government could present evidence to support those charges beyond a reasonable doubt as outlined in the attached written statement of

facts which has been reviewed by the defendant and his counsel.

c. Upon the District Court's adjudication of guilt of MIKOLA MAURICE BOWDEN for those charges contained in Count One of the indictment, the United States Attorney, Northern District of Florida, will not file any further criminal charges against MIKOLA MAURICE BOWDEN arising out of the same transactions or occurrences to which MIKOLA MAURICE BOWDEN has pled.

d. Nothing in this agreement shall protect the defendant in any way from prosecution for any offense committed after the date of this agreement. Should the defendant be charged with any offense alleged to have occurred after entry into this agreement, any statements, information or other evidence disclosed to the Government during the defendant's cooperation may be used against MIKOLA MAURICE BOWDEN in any such prosecution.

e. The parties agree that the sentence to be imposed is left solely to the discretion of the District Court, which is required to consult the United States Sentencing Guidelines and take them into account when sentencing the defendant. The parties further understand and agree that the District Court's discretion in imposing sentence is limited only by the statutory maximum sentence and any mandatory minimum sentence prescribed by statute for the offense charged in Count One.

f. The United States Attorney agrees not to recommend a specific sentence. However, the United States Attorney does reserve the right to advise the District Court and any other authorities of its version of the cir-

cumstances surrounding the commission of the offense by the defendant, including correcting any misstatements by defendant or defendant's attorney, and reserves the right to present evidence and make arguments pertaining to the application of the sentencing guidelines and the considerations set forth in Title 18, United States Code, Section 3553(a).

g. MIKOLA MAURICE BOWDEN agrees to cooperate fully and truthfully with the United States Attorney and her designated representatives and with agencies identified by the United States Attorney. Such cooperation shall include but is not limited to providing complete and truthful debriefings and testimony at grand jury, trial, and as otherwise requested, involving any matter under investigation.

h. MIKOLA MAURICE BOWDEN specifically waives any Fifth Amendment privilege and any other privilege inconsistent with the cooperation required by this agreement.

i. Defendant and his attorney agree to allow defendant to be interviewed as part of his cooperation under this agreement by the government or its state and/or local designees without prior notice or the presence of counsel, to include testimony in all necessary proceedings related to the information provided as part of the defendant's cooperation.

j. If all terms and conditions of this agreement are satisfied and there exists no cause for revocation as outlined in Section 3, any statements made by MIKOLA MAURICE BOWDEN pursuant to this agreement will be treated by the United States as given under Rule 11(f), Federal Rules of Criminal Procedure, Rule 410,

Federal Rules of Evidence and Sentencing Guideline Section 1B1.8.

k. The United States Attorney agrees to make known his opinion as to the nature and extent of the defendant's cooperation.

3. REVOCATION

a. The parties agree that the United States Attorney may revoke this agreement upon showing, by a preponderance of the evidence, any of the following:

1. that defendant has refused to cooperate as required by this agreement;

2. that defendant's statements or testimony has been untruthful or incomplete;

3. that defendant has failed to comply with any of the terms of this agreement;

4. that defendant has any criminal liability for homicide; or

5. that defendant has engaged in further criminal conduct after entering into this agreement.

b. If this agreement is revoked,

1. The plea of guilty entered by MIKOLA MAURICE BOWDEN pursuant to this agreement and any judgment entered thereon shall remain in full force and effect and will not be the subject of legal challenge by the defendant.

2. The United States may file charges without limitation by this agreement.

3. All statements, information and other evidence provided by MIKOLA MAURICE BOWDEN pursuant to this agreement or under Rule 11, Federal Rules of Criminal Procedure, may be used against the defendant in any proceeding in this or any other action.

4. The defendant, regardless of cooperation, and at the sole discretion of the United States Attorney, may be deemed not to have provided substantial assistance.

4. SENTENCING

a. If, in the sole discretion of the United States Attorney, MIKOLA MAURICE BOWEN is deemed to have provided substantial assistance in the investigation or prosecution of other persons who have committed offenses, if MIKOLA MAURICE BOWDEN has otherwise complied with all terms of this agreement, and if this assistance is prior to sentencing or within the time provided by Rule 35, Federal Rules of Criminal Procedure, then the United States Attorney will file a substantial assistance motion. Determination whether the defendant has provided substantial assistance will not depend upon charges being filed or convictions being obtained as a result of defendant's cooperation. Should a substantial assistance motion be filed, the granting of relief and the extent of relief is left solely to the discretion of the District Court.

b. Defendant understands that any prediction of the sentence which may be imposed is not a guarantee or binding promise. Because of the variety and complexity of issues which may arise at sentencing, the sentence is not subject to accurate prediction. The Court is not lim-

ited to consideration of the facts and events provided by the parties. Adverse rulings, or a sentence greater than anticipated shall not be grounds for withdrawal of defendant's plea.

c. The parties reserve the right to appeal any sentences imposed.

5. FORFEITURE

a. Prior to sentencing, the defendant shall accurately and completely identify every asset which is either owned by the defendant or is under the defendant's control. All property shall be identified, whether forfeitable or not.

b. Defendant agrees to fully and truthfully disclose all facts which could tend to make any interest which defendant owns or controls in property forfeitable under the laws of any jurisdiction, including property which may be forfeitable as substitute assets.

c. Defendant agrees to forfeit all forfeitable assets to the United States or to agencies designated by the United States. Defendant shall take all steps necessary to transfer forfeitable assets to the United States, including but not limited to executing any documents, consenting in any form or cause of action required by the United States, providing information and supporting documentation within the defendant's possession or control, and inducing persons holding property on the defendant's behalf to transfer such property to the United States. These transfers shall be completed prior to sentencing.

d. At his sole discretion, the United States Attorney may decline to forfeit assets where the value, or level of

equity, or interests not subject to forfeiture, or costs, or other factors make profitable forfeiture impractical.

CONCLUSION

There are no other agreements between the United States Attorney, Northern District of Florida and MIKOLA MAURICE BOWDEN, and MIKOLA MAURICE BOWDEN enters this agreement knowingly, voluntarily and upon advice of counsel.

GREGORY R. MILLER
United States Attorney

/s/ CHRISTOPHER PATTERSON
CHRISTOPHER PATTERSON, ESQ.
Attorney for Defendant

[7-13-2006]
Date

/s/ RANDALL J. HENSEL
RANDALL J. HENSEL
Florida Bar No. 301604
Assistant U.S. Attorney
Northern District of Florida
21 E. Garden Street, Suite 400
Pensacola, Florida 32502
850-444-4000

[7-13-06]
Date

/s/ MIKOLA MAURICE BOWDEN
MIKOLA MAURICE BOWDEN

[7-13-2006]
Date

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

5:06CR46/RS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MIKOLA MAURICE BOWDEN, DEFENDANT

July 13, 2006
10:30 a.m.

TRANSCRIPT OF REARRAIGNMENT
BEFORE THE HONORABLE RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

APPEARANCE:

FOR THE GOVERNMENT:

GREGORY R. MILLER
United States Attorney
BY: EDWIN FRANK KNIGHT
Assistant U.S. Attorney
21 E. Garden St., Suite 400
Pensacola, Florida 32501-4972

FOR THE DEFENDANT:

CHRISTOPHER N. PATTERSON
Attorney at Law
P.O. Box 9474
Panama City, Florida 32417

PROCEEDINGS

[2]

(Call to Order of the Court)

MR. PATTERSON: Good morning, Your Honor.

THE COURT: Good morning. All right, we are here for a change of plea in United States vs. Mikola Bowden, 6CR46.

Counsel, if you're ready, state your appearances.

MR. PATTERSON: Your Honor, Chris Patterson, on behalf of Mr. Bowden.

MR. KNIGHT: Ed Knight for the United States.

THE COURT: Okay. Mr. Bowden, this hearing has been scheduled because I understand that you want to change your plea from not guilty to guilty to Count 1 of the indictment.

THE DEFENDANT: Yes, sir.

THE COURT: You don't have to plead guilty, but before I am able to accept your change of plea, I am required to talk to you to make sure that you understand what you're doing, that you understand the consequences of pleading guilty, and that the facts do support a guilty plea. So I'll need to ask you some questions.

Before we do that, the clerk will swear you in under oath. And that's going to require that you tell the truth. If you answer any of my questions falsely, that could be the basis for another prosecution for perjury, or making a false statement. Do you understand that?

THE DEFENDANT: Yes, sir.

DEPUTY CLERK: Please raise your right hand.

(Defendant duly sworn.)

[3]

DEPUTY CLERK: Please state your full name and spell your last name for the record.

THE DEFENDANT: Mikola Maurice Bowden, B-O-W-D-E-N.

THE COURT: Mr. Bowden, how old are you now?

THE DEFENDANT: Twenty-nine.

THE COURT: Tell me about your education.

THE DEFENDANT: I went to Bay High School—I mean, I went through all the grades and then in the 11th I got a GED after attending Bay High School. I took a vocational small gasoline engine certified, and I took a dental assistance, but I didn't finish.

THE COURT: You are able to read and write satisfactorily then?

THE DEFENDANT: Yes, sir.

THE COURT: Are you married?

THE DEFENDANT: No sir.

THE COURT: Where are you from originally?

THE DEFENDANT: Panama City.

THE COURT: Panama City. Do you have family here in Panama City?

THE DEFENDANT: Yes sir.

THE COURT: What kind of work were you doing before you were taken into custody?

[4]

THE DEFENDANT: Delivering produce.

THE COURT: I'm sorry, what?

THE DEFENDANT: Delivering produce.

THE COURT: Who were you working for?

THE DEFENDANT: Adam produce, Crestview Produce.

THE COURT: Have you been treated for any emotional or mental illness or addiction to drugs?

THE DEFENDANT: No, sir.

THE COURT: Are you currently under the influence of any legal or illegal drug, prescription or nonprescription medicine or alcoholic beverage?

THE DEFENDANT: No, sir.

THE COURT: Have you taken any drug, medicine or alcohol in the last 24 hours?

THE DEFENDANT: No, sir.

THE COURT: I now need to talk to you about rights that you have, and listen carefully, because by pleading guilty, you will give up most of these rights.

Now you don't have to plead guilty. You have the right to plead not guilty. And if you do, the government would have the burden of proving your guilt to the jury by a standard of proof known as beyond a reasonable doubt. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: There is no burden on you to prove that [5] you are innocent because the law presumes that you are innocent until the government proves you guilty. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to remain silent. And if you were to plead not guilty and go to trial, you could testify if you wanted to. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to confront witnesses. That means you have the right to see, to hear, and to cross-examine any witness that would testify against you at trial. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: And you have the right to compel the attendance of witnesses for you, and to have those witnesses present and testify on your behalf at trial. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: You have the right to a trial by jury, and to have that jury determine if you are guilty or innocent. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: And you have the right to present evidence at trial. And the government would have to present [6] all of its evidence in open court at trial. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: And you have the right to be represented by an attorney at all stages of the case. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, I want to talk to you a little bit more specifically about pleading guilty. Do you understand the difference between a plea of guilty, which admits the truth of the charge against you, and a plea of not guilty, which denies the charge? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now if you plead guilty, you will give up all of the rights that I have just gone over except the right to be represented by an attorney. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, if you plead guilty and I accept your plea, there will not be a trial. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty and I accept your plea, you will give up any defense you might have to the charge against you. You understand?

THE DEFENDANT: Yes, sir.

THE COURT: And if you plead guilty, there are certain issues that may be appealed and other issues that cannot be appealed. Now if you don't like my sentence, you may or you may not be able to get an appellate court to review it. But you will not be able to take back your guilty plea. That's a final decision. You understand?

THE DEFENDANT: Yes, sir.

[7]

THE COURT: All right, I want to go over, Mr. Bowden, the charge against you in the indictment. And Count 1 says that on or about April 9th, 2006, in the Northern District of Florida, that you knowingly and intentionally possessed with intent to distribute a controlled substance in violation of 21 U.S. Code, section 841(a)(1); and that the offense involved 50 grams or more of a mixture and substance containing cocaine base, commonly known as crack cocaine, in violation of 21 U.S. Code, section 841(b)(1)(A)(iii). The indictment also calls for you to forfeit to the United States, pursuant to 21 U.S. Code, section 853(a)(1) and (2), all of your interest in property constituting or derived from any proceeds that you obtained directly or indirectly from your violation in Count 1, and property used in any manner to commit or facilitate the commission of that crime.

Now, are you aware of this charge and this claim for forfeiture in the indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that if you were to persist in your plea of not guilty, that the government would have the burden of proving each element of the charge beyond a reasonable doubt?

THE DEFENDANT: Yes, sir.

THE COURT: Now, it would require the government to [8] prove the following facts beyond a reasonable doubt:

First, that you knowingly and willfully possessed cocaine based as charged; second, that you possessed the substance with intent to distribute it; and third, that the weight of the cocaine base possessed by you was in excess of 50 grams of cocaine base. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I understand that we have a statement of facts and elements of the offenses that bears Mr. Hensel's signature?

MR. KNIGHT: That's correct, Your Honor. I believe that's been filed with the clerk's office.

MR. PATTERSON: Your Honor, we have received that. We've had that for several weeks, and we have no objections to the facts as offered by the government as to what they intend to prove.

MR. KNIGHT: Your Honor, if that's not been filed, I have a copy.

THE COURT: If you would let Mr. Bowden see a copy. Mr. Bowden, that is the statement of facts that the government has filed. Have you had an opportunity to go over that document with Mr. Patterson?

THE DEFENDANT: Yes, sir.

THE COURT: Are the facts that are set forth in that document true?

[9]

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that the facts in the statement, which you have admitted are true, are sufficient for the jury to find you guilty on Count 1?

THE DEFENDANT: Yes, sir.

THE COURT: All right, Mr. Bowden, I need to now go over with you the maximum sentence that could be imposed. And you understand that if the government establishes that you have two prior convictions for felony drug offense, that you are looking at an enhanced sentence?

THE DEFENDANT: Yes, sir.

THE COURT: If the government can establish enhancement for two prior convictions of felony drug offense, the maximum penalty would be a mandatory term of life imprisonment without release, and a term of supervised release of at least ten years, a fine in the amount of $8 million, a special monetary assessment of $100, and forfeiture of all forfeitable assets to the Uni-

ted States. Do you understand that that is the maximum sentence that could be imposed?

THE DEFENDANT: Yes, sir.

THE COURT: Now you've heard that the sentence includes supervised release. Did you not?

THE DEFENDANT: Yes, sir.

THE COURT: You understand what supervised release is?

THE DEFENDANT: Yes, sir.

[10]

THE COURT: It's like being on probation after you're released from prison. If you were to be released from prison, you would be required to serve under the supervision of the probation office a period of supervised release. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And if you were to violate the terms of the supervised release, you understand that it could result in you being sent back to prison?

THE DEFENDANT: Yes, sir.

THE COURT: I want to talk to you now about the sentencing guidelines because those have a large bearing on how you're going to be sentenced. Have you heard about the sentencing guidelines?

THE DEFENDANT: Yes, sir.

THE COURT: Under the Sentencing Reform Act of 1984, the United States Sentencing Commission has

issued guidelines for judges to consider in determining the sentence in a criminal case such as this. Now in determining your sentence, I will calculate the applicable sentencing guideline, possible departures under the, guidelines and other sentencing factors under the law. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now, have you talked to Mr. Patterson about how the guidelines will apply to you?

[11]

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that neither Mr. Patterson nor the attorney for the government know how I may interpret and apply the guidelines in your case?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that? Now, do you understand that the actual sentence that I impose could be different than what your attorney is predicting? You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you also understand that the—that parole has been abolished, and if you are sentenced to prison, you will not be released on parole? You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do we have a plea and cooperation agreement?

MR. KNIGHT: Yes, Your Honor.

THE COURT: Give that to Mr. Bowden.

Mr. Bowden, you are being handed the plea and cooperation agreement. Did you read that document carefully and then sign your name to it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have sufficient opportunity to talk to Mr. Patterson about that agreement before you signed [12] it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about the agreement before we have it filed in the record?

THE DEFENDANT: No, sir.

THE COURT: Now, does the plea and cooperation agreement represent your entire agreement with the government?

THE DEFENDANT: Yes, sir.

THE COURT: Are you counting on any secret promise made to you that is not written in the plea agreement?

THE DEFENDANT: No, sir.

THE COURT: Do you understand the terms of the plea and cooperation agreement?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone made any promise to you other than what is written in that agreement to induce you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anybody threatened you, used force or intimidation to induce your plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading guilty of [*sic*] your own free will because you are guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you have received a copy of [13] the indictment, have you not?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had adequate time to talk to your attorney about the charge in the indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Have you had adequate time to discuss your case with Mr. Patterson and have him explain to you all of the possible defenses you might have?

THE DEFENDANT: Yes, sir.

THE COURT: Has he answered all of your questions?

THE DEFENDANT: Yes, sir.

THE COURT: Are you fully satisfied with the advice given to you in this case by your attorney, Mr. Patterson?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any complaints about your lawyer?

THE DEFENDANT: No, sir.

THE COURT: Mr. Patterson, have you had adequate time to discuss the case with Mr. Bowden and to advise him?

MR. PATTERSON: Yes, Your Honor, I have.

THE COURT: Do you have any complaints?

MR. PATTERSON: No, sir.

THE COURT: Can you assure me that Mr. Bowden's plea is freely and voluntarily made, and can you assure me that insofar as you know, no assurances, promises or understandings [14] have been given to Mr. Bowden about the disposition of the case which are any different or contrary to what I have just discussed with him and made a matter of record in open court?

MR. PATTERSON: I so certify.

THE COURT: And can the government give the same assurances?

MR. KNIGHT: Yes, Your Honor.

THE COURT: All right. Mr. Bowden, knowing the rights that you will waive, and considering what we've talked about this morning, how do you now plead to the charge against you in Count 1 of the indictment, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Are you pleading guilty because you have committed that offense?

THE DEFENDANT: Yes, sir.

THE COURT: The court finds that you, Mikola Maurice Bowden, are now alert and intelligent, that you understand the charge against you, that you appreciate the consequences of pleading guilty, that you are fully competent and capable of entering an informed plea, that your decision to plead guilty is freely and voluntarily made, and that you have had the advice of a competent lawyer with whom you are satisfied.

I find the facts that the government is prepared to prove and the facts that you have admitted and stated under oath in open court are sufficient to sustain a finding of guilt [15] on each element of Count 1 of the indictment. I therefore accept your plea of guilty to Count 1 and I adjudicate you guilty on Count 1 of the indictment.

Mr. Bowden, you are aware that the government has filed a notice of enhancement in this case because it contends that you have two prior felony drug convictions?

THE DEFENDANT: Yes, sir.

THE COURT: And you've talked about that with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Now, the probation office will prepare a written presentence investigation report to help me in determining your sentence. And you will be required to meet with the probation officer and give information to assist the officer in developing the presentence report. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now you have the right to have your attorney present with you when you meet with the probation officer if you desire. Now it's important that you tell the probation officer about any facts that you want me to consider in determining your sentence, and that will include the names of people you want the probation officer to interview. You understand?

THE DEFENDANT: Yes, sir.

[16]

THE COURT: Now you and your attorney will have the right to review the presentence investigation report and file any objections to that report before the sentencing hearing. But there are pretty tight deadlines to file objections to the report. So when you get the report, you need to review it promptly and thoroughly, and let Mr. Patterson know if there's anything that you are concerned that may be incorrect in that report so he can file objections before the deadline. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions?

THE DEFENDANT: No, sir.

THE COURT: All right, sentencing is scheduled for October 11th at 9:30 a.m. here in Panama City. Is there anything else that we need to take up for Mr. Bowden's case?

MR. KNIGHT: Yes, Your Honor. I misspoke earlier when I indicated to the court that the statement of facts and elements of the offense had been electronically filed. It has not. So I would like for the pleading

that's title "Statement of Facts and Elements of the Offense" to be incorporated into the record. It's the same pleading that the defendant reviewed during the course of the colloquy.

MR. PATTERSON: That's correct, Your Honor.

THE COURT: It will be made part of the record.

MR. KNIGHT: Thank you, Your Honor.

[17]

THE COURT: Anything further?

MR. KNIGHT: No, sir.

MR. PATTERSON: No, sir.

THE COURT: That will conclude this hearing.

(Proceeding concluded at 10:58 a.m.)

* * * * *

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

5:06CR46/RS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MIKOLA MAURICE BROWN, DEFENDANT

Oct. 11, 2006
9:30 a.m.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

APPEARANCE:

FOR THE GOVERNMENT:

GREGORY R. MILLER
United States Attorney
BY: RANDALL J. HENSEL
Assistant U.S. Attorney
21 E. Garden St., Suite 400
Pensacola, Florida 32501-4972

FOR THE DEFENDANT:

CHRISTOPHER N. PATTERSON
Attorney at Law
P.O. Box 9474
Panama City, Florida 32417

[2]

PROCEEDINGS

(Call to order of the Court)

THE COURT: Good morning. Our first case is United States vs. Bowden. Are you ready?

MR. PATTERSON: Good morning, Your Honor.

THE COURT: Good morning.

MR. HENSEL: Morning, sir.

THE COURT: Mr. Patterson, how are you doing?

MR. PATTERSON: I am well, sir. How are you, sir?

THE COURT: Good. Are we ready?

MR. PATTERSON: Yes, sir, we are.

THE COURT: Counsel, if you would state your names for the record, please.

MR. PATTERSON: Chris Patterson, counsel of record for the defendant, Mikola Bowden.

MR. HENSEL: Randy Hensel, Assistant United States Attorney, for the government.

THE COURT: Mr. Bowden, this is the hearing for your sentencing. And the way we'll conduct this is that I will hear from your attorney, Mr. Patterson, about his review of the presentence investigations report and determine if there are any outstanding objections. I will hear from the United States Attorney.

I will then hear from both attorneys about what they believe an appropriate sentence should be, and I will give you [3] an opportunity to speak also if you desire. You don't have to say anything, but you have that right. And if you have something you would like to say, I will certainly listen to it.

I am going to have the clerk swear you in, if you do want to say anything.

DEPUTY CLERK: Please raise your right hand.

(Defendant duly sworn.)

DEPUTY CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Mikola Maurice Bowden, B-O-W-D-E-N.

THE COURT: Mr. Patterson, have you had an opportunity to review the presentence investigation report with Mr. Bowden?

MR. PATTERSON: I have, Your Honor, on several occasions.

THE COURT: Are there any unresolved objections at this time?

MR. PATTERSON: No sir. We do not make any objection, legal objection, to the presentence report as prepared.

THE COURT: Okay. Mr. Hensel, does the government have any objections to the presentence report?

MR. HENSEL: No, we do not, Judge.

THE COURT: Mr. Bowden, did you review the presentence investigation report?

THE DEFENDANT: Yes, sir.

[4]

THE COURT: Do you have any questions about that report or any objections which you would like to state?

THE DEFENDANT: No, sir.

THE COURT: Okay. Mr. Patterson, would you like to make some comments about sentencing?

MR. PATTERSON: Your Honor, if I may, the—my client, Mr. Bowden, upon his arrest, began providing assistance to law enforcement, which led to, at least in part, the arrest and subsequent plea of a codefendant, Mr. J.C. Williams before this court. Mr. Bowden stands ready to continue his cooperation pursuant to the plea agreement that he signed with the government, and looks forward to providing further assistance to the government after today.

We understand that there is no motion for a substantial assistance that has been filed as of today, but I want the court, and obviously Mr. Hensel, to be on no-

tice that we stand ready to continue with our cooperation and pledge to do so.

THE COURT: Mr. Hensel, do you have any comments?

MR. HENSEL: Judge, he has been cooperating to date. It has not risen to the level of substantial assistance justifying me filing a motion today.

And as far as the sentence he's facing, as the court is aware, I did file a notice of enhancement. He does have two prior qualifying felonies that are reflected in his presentence [5] report at paragraphs 38 and 39. And as a result, based on the amount of drugs, he's facing mandatory life. So he certainly should be ready to continue his cooperation.

THE COURT: Mr. Bowden, you and I need to have a conversation now about the notice of enhancement. Are you aware that the government filed a notice of enhancement in the case because of your two prior convictions?

THE DEFENDANT: Yes, sir.

THE COURT: Now I need to ask you about your two prior convictions, whether you affirm or deny that you have been previously convicted as alleged. And the reason this is important, if you deny that you were convicted as stated in the enhancement, you must state that now or you will not be permitted to raise that issue later to attack your sentence on appeal. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now the notice of enhancement states that you were convicted in the Circuit Court for Bay County on two separate occasions of the offense of possession of a controlled substance, cocaine, in case No. 01-1339, on January 21, 2003, and in case 02-3149 on February 6th, 2003. Now, do you deny or do you affirm that you were in fact convicted on those two occasions as stated?

THE DEFENDANT: Sir, you say February 3, 2006?

THE COURT: February 6th, 2003.

[6]

THE DEFENDANT: I was in jail then.

MR. PATTERSON: Your Honor, if I could have a minute, please.

(Defendant and counsel conferring.)

THE DEFENDANT: Okay.

MR. HENSEL: Judge, I think what may be confusing is he got a—in the original case, reflected in the presentence report at paragraph 38, he originally got placed on community control and then he violated that. And then January 21st of '03 his community control was revoked and he got 40 months of Department of Corrections. And then the following month, February 6th of '03, is when he pled nolo to the other possession of cocaine charge, but those were separate offenses, separate dates, and that may be what confused him.

THE COURT: Mr. Bowden, are you satisfied that you understand now what we're talking about?

THE DEFENDANT: Yes, sir.

THE COURT: Do you admit or do you deny that you were convicted as stated on those two prior occasions?

THE DEFENDANT: I admit.

THE COURT: Counsel, is there anything else that anyone needs to say before we proceed with sentencing?

MR. HENSEL: No, sir, Judge.

MR. PATTERSON: No, Your Honor.

THE COURT: All right. I have previously adjudicated [7] Mikola Maurice Bowden guilty as charged in Count 1 of the indictment in accordance with his plea of guilty. I determine that the presentence investigation report is accurate and I order the findings of the report to be incorporated into the following sentence:

Pursuant to the Sentencing Reform Act of 1984, and all amendments, it is the judgment of the court that defendant, Mikola Maurice Bowden, is hereby committed to the custody of the Bureau of Prisons for a term of life imprisonment. Upon review of all factors properly considered under 18 U.S. Code, section 3553(a), and taking into account the advisory nature of the United States Sentencing Guidelines, I conclude that this sentence, which is required by statute, and is within the restricted guideline range, is appropriate. This sentence is sufficient. A lower sentence would not be sufficient, and a greater sentence is not necessary to comply with the statutorily defined purposes of sentencing.

In making this sentencing decision, I have consulted the U.S. Sentencing Guidelines and have calculated the applicable restricted advisory range to be mandatory life imprisonment, and this is based upon a base offense level of 32, and this is for a least 50 grams, but less than 150 grams, of cocaine base.

There is an upward adjustment of 37 for career offender provision, a downward adjustment of 3 for acceptance {8} of responsibility. This results in a total offense level of 34 and a criminal history category of 6.

I then determined whether pursuant to the sentencing commission's policy statements if any departures or variances from the advisory guideline range were clearly appropriate. In this case a departure or variance from the guideline range is not warranted.

I find that Mr. Bowden does not have the financial ability to pay a fine in any amount, therefore imposition of a fine is waived. However, it is ordered that Mr. Bowden shall pay a special monetary assessment in the amount of $100, as required by 18 U.S. Code, section 3013. The special monetary assessment shall be duty immediately.

Upon release from imprisonment, Mr. Bowden shall be placed on supervised release for a term of ten years. The term of supervised release shall be under the standard conditions of supervision adopted for use in the Northern District of Florida and the following special conditions:

Defendant shall not own or possess, either directly or constructively, a firearm, ammunition, dangerous weapon or destructive device.

Defendant shall provide the probation officer with all requested financial information, both business and personal.

Defendant shall submit to testing to determine if he is using drugs or alcohol.

[9]

Defendant shall participate in a program of substance abuse treatment.

Defendant shall cooperate with the probation department and/or the appropriate state agency in the establishment and enforcement of child support payments and shall make all required child support payments.

Defendant shall cooperate with the probation office in the collection of DNA samples as required by 42 U.S. Code, section 14135(a).

Total sentence is life imprisonment, ten years' supervised release and $100 special monetary assessment.

Counsel, are there any objections to my ultimate findings of fact or conclusions of law relating to this sentence?

MR. PATTERSON: No objections, but we would ask the court to consider Mr. Bowden while in the Bureau of Prisons for the intensive drug treatment program there, believing if he is otherwise eligible, he could benefit by participating in that program.

MR. HENSEL: No objections.

THE COURT: I will make that recommendation that the Bureau of Prisons consider placing Mr. Bowden in its long term residential substantial abuse program.

Are there any objections to the manner in which I pronounced sentence?

[10]

MR. PATTERSON: No, sir.

MR. HENSEL: No, sir.

THE COURT: Mr. Bowden, you are advised that you have the right to appeal this sentence. If you are unable to afford the cost of an appeal, you may apply for leave to appeal informa pauperis. Any notice of appeal must be filed within ten days. If you request, the court clerk will immediately file a notice of appeal on your behalf. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Mr. Bowden will remain in custody until he is delivered to the Bureau of Prisons. Anything further?

MR. HENSEL: No sir, Judge.

MR. PATTERSON: No, Your Honor.

THE COURT: That will conclude this hearing.

(Proceeding concluded at 9:40 a.m.)

APPENDIX I

1. Section 851 of Title 21 of the United States Code provides:

Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether

he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information

before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

145 (2)

No. 09-244

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MIKOLA BOWDEN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When the government files an information under 21 U.S.C. § 851(a), but misstates the statutory enhancement and the date of the prior conviction, and the defendant fails to object in the district court and the defendant's plea does not waive his right to appeal, is the standard of review on a subsequent appeal *de novo* or instead plain error?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
BRIEF IN OPPOSITION 1
RELEVANT STATUTORY PROVISION 1
STATEMENT 1
ARGUMENT 6
I. The Question Presented Does Not Merit This Court's Attention 7
A. The Question Whether Section 851 Is A "Jurisdictional" Provision Affects Almost No Cases 7
B. The Government Itself Can Ensure The Proper Application Of Section 851 10
C. As The Government Has Previously Argued, This Court's Intervention Is Unwarranted Because The Law Of The Eleventh Circuit Is Unsettled 12
II. This Is A Poor Vehicle In Which To Decide The Question Presented 17
III. The Eleventh Circuit's Decision Was Correct On The Merits 20
A. This Court's Recent Precedents Support The Eleventh Circuit's Decision And Demonstrate That Summary Reversal Is Inappropriate 20
B. The Eleventh Circuit's Decision Properly Comports With The Statute's Plain Language And Congressional Intent 25

CONCLUSION 29

APPENDIX A, Eleventh Circuit Opinion In *United States v. Anthony* 1a

APPENDIX B, Eleventh Circuit Opinion In *United States v. Brown* 15a

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466 (2000) 23

Beasley v. United States,
128 S. Ct. 1471 (2008) 13, 15

Bowles v. Russell,
551 U.S. 205 (2007) 20, 21, 22, 23

Brosseau v. Haugen,
543 U.S. 194 (2004) 20

Dill v. Gen. American Life Ins. Co.,
525 F.3d 612 (8th Cir. 2008) 23

Eberhart v. United States,
546 U.S. 12 (2005) 22, 23, 24, 25

Gardner v. Florida,
430 U.S. 349 (1977) 25

Harris v. United States,
149 F.3d 1304 (11th Cir. 1998) ..... passim

In re Ellis,
356 F.3d 1198 (9th Cir. 2004) 28

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 21, 22

Kontrick v. Ryan,
540 U.S. 443 (2004) 22, 23, 25

Oyler v. Boles,
368 U.S. 448 (1962) 25

Perez v. United States,
249 F.3d 1261 (11th Cir. 2001) ..... passim

Prou v. United States,
199 F.3d 37 (1st Cir. 1999) 9, 10, 19

Quintanilla v. United States,
538 U.S. 926 (2003) 13

Schweiker v. Hansen,
450 U.S. 785 (1981) 20

Severino v. United States,
540 U.S. 837 (2003) 13, 18, 19

Spears v. United States,
129 S. Ct. 840 (2009) 20

United States v. Anguiano,
197 Fed. Appx. 342 (5th Cir. 2006) 11

United States v. Anthony,
No. 08-14370, 2009 U.S. App. LEXIS 20194
(11th Cir. Sept. 10, 2009) ..... passim

United States v. Archer,
531 F.3d 1347 (11th Cir. 2008) 4

United States v. Brown,
No. 08-15488, 2009 U.S. App. LEXIS 21370
(11th Cir. Sept. 25, 2009) ..... passim

United States v. Ceballos,
302 F.3d 679 (7th Cir. 2002) 14

United States v. Cespedes,
151 F.3d 1329 (11th Cir. 1998) 27, 28

United States v. Cotton,
535 U.S. 625 (2002) 4, 22, 23

United States v. Curiale,
390 F.3d 1075 (8th Cir. 2004) (per curiam) 9, 26

United States v. Dodson,
288 F.3d 153 (5th Cir. 2002) 19

United States v. Eberhart,
388 F.3d 1043 (7th Cir. 2004) 25

United States v. Flowers,
464 F.2d 1127 (10th Cir. 2006) 13

United States v. Frias,
521 F.3d 229 (2d Cir. 2008) 24

United States v. Garduño,
506 F.3d 1287 (10th Cir. 2007) 24

United States v. Gonzalez-Lerma,
14 F.3d 1479 (10th Cir. 1994) 26

United States v. Griffin,
524 F.3d 71 (1st Cir. 2008) 23

United States v. Hardin,
108 Fed. Appx. 74 (4th Cir. 2004) 10

United States v. Hogan,
986 F.2d 1364 (11th Cir. 1993) 13

United States v. King,
73 F.3d 1564 (11th Cir. 1996) 15

United States v. LaBonte,
520 U.S. 751 (1997) 28

United States v. Mayfield,
418 F.3d 1017 (9th Cir. 2005) 26

United States v. Morales,
560 F.3d 112 (2d Cir. 2009) 26

United States v. Noland,
495 F.2d 529 (5th Cir. 1974) 27

United States v. Resendiz-Ponce,
549 U.S. 102 (2007) 18

United States v. Rodriguez,
137 Fed. Appx. 682 (5th Cir. 2005) 11

United States v. Weaver,
267 F.3d 231 (3d Cir. 2001) 9, 26

United States v. Williams,
No. 09-1924, 2009 U.S. App. LEXIS 22496
(7th Cir. Oct. 14, 2009) 12

Statutes

21 U.S.C. § 841 23
21 U.S.C. § 841(a)(1) 2
21 U.S.C. § 841(b)(1)(A) 2, 3
21 U.S.C. § 841(b)(1)(A)(iii) 2
21 U.S.C. § 841(b)(1)(B) 3
21 U.S.C. § 851(a)(1) ..... passim
28 U.S.C. § 2107(a) 21
28 U.S.C. § 2255 ..... 4, 9, 19
28 U.S.C. § 2501 21

Rules

Fed. R. App. P. 4(a)(1)(A) 21
Fed. R. Bankr. P. 4004 22
Fed. R. Bankr. P. 9006 22
Fed. R. Crim. P. 4(b) 24
Fed. R. Crim. P. 33 ..... 22, 24
Fed. R. Crim. P. 35(a) 23
Fed. R. Crim. P. 45 22
S. Ct. R. 10 24

Other Authorities

H.R. Rep. No. 91-1444 (1970) 27
Letter from Paul D. Clement, Solicitor Gen., to
William K. Suter, Clerk of the Supreme Court
of the U.S. (Feb. 19, 2008), *available at*

http://www.scotusblog.com/wp/wp-content/uploads/2008/02/beasley-correction-letter.pdf 13

BRIEF IN OPPOSITION

RELEVANT STATUTORY PROVISION

21 U.S.C. § 851(a)(1) provides in relevant part:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. . . . Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

STATEMENT

Federal law conditions a court's power to impose an enhanced statutory penalty for certain repeat drug offenders on the Government providing notice to the court and the defendant, before trial or the entry of a guilty plea, of the prior convictions on which it will rely. 21 U.S.C. § 851(a)(1) ("Section 851"). In this case, the Government timely submitted a notice, but it was inaccurate. Respondent expressed confusion regarding the sentence but his counsel did not formally object, and the district court imposed the enhanced sentence. In an unpublished opinion, the Eleventh Circuit applied *de novo* review and held that the Government had violated Section 851. In two subsequent decisions, the Eleventh Circuit has found no violation of Section 851 on similar facts and has

pointedly recognized that the unpublished ruling in this case has no precedential value.

1. Under federal law, any person who manufactures, distributes, or possesses with the intent to manufacture or distribute fifty grams or more of crack cocaine is subject to a sentence of between ten years and life imprisonment. 21 U.S.C. § 841(a)(1); *id.* § 841(b)(1)(A)(iii). The Government may request an enhanced statutory penalty for repeat drug offenders. *Id.* § 841(b)(1)(A). A defendant with two prior felony drug convictions is subject to a mandatory term of life imprisonment. *Id.*

The imposition of an enhanced sentence is conditioned, however, on the Government's compliance with the simple notice procedure of 21 U.S.C. § 851(a)(1). The Government must, before trial or entry of a guilty plea, "file[] an information with the court (and serve[] a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). If the Government needs more time to obtain the facts regarding a prior conviction, it may request a postponement of the trial or guilty plea. In addition, "[c]lerical mistakes in the information may be amended at any time prior to the pronouncement of sentence." *Id.*

2. In May 2006, respondent Mikola Bowden was indicted on one count of possessing with intent to distribute fifty grams or more of crack cocaine. Pet. App. 6a-7a. On July 5, 2006, the Government filed an information pursuant to Section 851 seeking an enhanced sentence. Pet. App. 10a-11a. The Government later stated that it had intended its notice to allege two prior felony drug convictions and to seek

a mandatory life sentence under 21 U.S.C. § 841(b)(1)(*A*). In fact, however, in two separate places, the information instead stated that "the defendant is subject to the increased penalty provisions" of 21 U.S.C. § 841(b)(1)(*B*), which authorize a sentencing range from ten years to life imprisonment. Pet. App. 10a. Nowhere did the information indicate that the Government sought mandatory life imprisonment. Further, the information misstated the date of one of respondent's two prior drug convictions. As the Government later acknowledged, its notice in this case "contained significant errors that made it ambiguous." Br. for United States at 38, *United States v. Anthony*, No. 08-14370, 2009 U.S. App. LEXIS 20194 (11th Cir. Sept. 10, 2009) (describing the notice in this case).

The Government did not amend the notice to correct either error. Both the plea agreement and the plea colloquy contained unclear guidance regarding the possible sentence. Pet. App. 18a-20a, 34a-36a; Resp. C.A. Br. 6-7, 19-21. During his sentencing hearing, respondent in turn expressed his confusion about the enhancement. Pet. App. 48a-49a. The Government acknowledged his confusion. Pet. App. 48a. But respondent's counsel did not object to the notice or enhancement.[1] The district court entered a guilty plea to the single count in the indictment, sentencing respondent to life imprisonment.

---

[1] Other documents in the case referred to the Section 841(b)(1)(A) sentencing enhancement, and one document stated the correct date of convictions. Pet. App. 18a, 34a-35a; PSR paras. 3, 38.

3. Respondent's guilty plea did not contain a waiver of his right to appeal, and he challenged the sentencing enhancement in the Eleventh Circuit. Respondent's initial appeal, however, was dismissed as untimely. He then filed a motion under 28 U.S.C. § 2255, arguing that his counsel's failure to timely appeal was constitutionally ineffective. The district court granted the motion and entered a new judgment from which respondent sought to appeal.

Respondent argued in this later appeal that the defects in the information violated Section 851, such that his sentencing enhancement was invalid. In response, the Government argued that its errors were not significant enough to constitute failure to comply with Section 851 under the Eleventh Circuit's decision in *Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001). U.S. C.A. Br. 19. According to the Government, because the text of the statute does not mandate that the information cite the specific statutory basis for the sentencing enhancement, it should follow that the information's citation to the *wrong* statutory provision is irrelevant, even if the incorrectly cited provision calls for a different sentence. *Id.* Similarly, the Government argued, the recitation of an incorrect date of conviction was too insignificant an error to violate Section 851.

The Government did not argue to the panel that the Eleventh Circuit's holding in *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998), that Section 851 is a jurisdictional statute has been superseded by this Court's subsequent precedent, including *United States v. Cotton*, 535 U.S. 625 (2002). *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent

panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court . . . ."). Thus, the panel operated from the premise that respondent could challenge the notice in his case, notwithstanding that he did not formally object in the district court. Pet. App. 2a.

In an unpublished, nonprecedential opinion, the court of appeals agreed with respondent that the Government had violated Section 851. The panel reasoned that because the Section 851 notice in this case "did not unambiguously signal to [respondent] that it sought mandatory life imprisonment" and "failed to clearly indicate 'the previous convictions to be relied upon'," the notice of enhancement "did not strictly comply with §851(a)(1)." Pet. App. 1a-3a. The panel vacated respondent's conviction and remanded for resentencing without the enhancement.

On August 26, 2009, respondent was resentenced to a term of 294 months. He will not be released from prison until he is 55 years old. The Government acquiesced to that sentence by not appealing.

4. The Government sought reconsideration in the Eleventh Circuit. It argued for panel rehearing on the ground that the errors in the notice did not violate Section 851 under the Eleventh Circuit's decision in *Perez*. U.S. Pet. Reh'g 6-7.

As noted, the Government could have asked the panel to hold that *Harris* had been superseded by this Court's intervening decisions. But it did not do so. Instead, the Government invited the full court of appeals to sit en banc and overrule *Harris*. The Government acknowledged, however, that the Eleventh Circuit had not overturned a single sentence

under *Harris* in the decade prior to its unpublished opinion in this case. U.S. Pet. Reh'g 8 n.3.

The petition was denied, with no judge requesting that the court be polled on rehearing en banc. Pet. App. 4a.

5. Subsequently, the Eleventh Circuit decided two cases on similar facts, ruling for the Government in each. On September 10, 2009, the court held in another unpublished opinion that, even under *de novo* review, a Section 851 information was sufficient despite failing to identify the date of the prior conviction or the relevant statutory provision supporting the enhancement. *United States v. Anthony*, No. 08-14370, 2009 U.S. App. LEXIS 20194, at *1 (11th Cir. Sept. 10, 2009), *reprinted in* App., *infra* BIO App. 1a. The panel relied on that court's ruling in *Perez*, *supra*, and stated that the unpublished ruling in the instant case was not precedential authority. *Anthony*, BIO App. 13a-14a.

Two weeks later, another panel that included two of the judges who decided the instant case (Anderson and Marcus, JJ.), held, also on the basis of *Perez*, that an incorrect penalty citation in a Section 851 notice is a harmless "technical error" when the correct enhancement provision was listed in the plea agreement and was acknowledged by the defendant at his plea hearing and sentencing. *United States v. Brown*, No. 08-15488, 2009 U.S. App. LEXIS 21370, at *1 (11th Cir. Sept. 25, 2009), *reprinted in* App., *infra* 15a.

ARGUMENT

The Government seeks review of an unpublished, interlocutory ruling that presents only the second time

the Eleventh Circuit has ever overturned a sentencing enhancement under Section 851 applying *de novo* review, and the only such decision in more than a decade. This Court's intervention is unwarranted. The question is not only insignificant, but two intervening decisions demonstrate that the court of appeals' precedent is unsettled. It remains entirely possible that the Eleventh Circuit will reconsider its position. The Government has successfully urged this Court to deny review of the question presented, and no intervening development undercuts the wisdom of that position.

Certiorari should be denied for a number of further reasons as well. This case is a poor vehicle in which to decide the question presented, as the principal issue in the case is the threshold question whether Section 851 was violated at all. If it was not, then the Court would have no cause to decide the statute's "jurisdictional" status. Nor is there any basis for the Government's argument that the judgment should be summarily reversed, a suggestion that only highlights the weakness of its case for plenary review.

I. The Question Presented Does Not Merit This Court's Attention.

A. The Question Whether Section 851 Is A "Jurisdictional" Provision Affects Almost No Cases.

The Government seeks review of a question of startling insignificance. Perhaps the petition's most telling feature is that the Section ostensibly devoted to explaining why "[t]he Question Presented is important," Pet. Part C, actually contains no

discussion of that critical element of this Court's certiorari calculus. Though it has filed briefs in this Court on this issue three times – each time opposing review, *see infra* at 12-13 – the Government has never before suggested that the question has any recurring significance. That is because it does not.

The Government complains that the Eleventh Circuit alone applies *de novo* review to erroneous Section 851 notices when the error was not noted in the district court. But respondent appears to be the only individual whose sentencing enhancement has been overturned by the Eleventh Circuit on that basis in the decade since its decision in *Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998). Indeed, *Harris* and this case appear to be the only two rulings in the entire history of the Eleventh Circuit in which the court of appeals invalidated a sentence for noncompliance with Section 851 on a ground that had not previously been presented to the district court.

The reason the question presented almost never arises is readily apparent. The Eleventh Circuit's published precedent holds that technical violations of Section 851 do not invalidate sentencing enhancements. *See Perez v. United States*, 249 F. 3d 1261, 1266 (11th Cir. 2001) (holding that a timely filed notice that "unambiguously signal[s] the government's intent to rely upon a specific" prior conviction satisfies the requirements of Section 851 regardless of minor errors in content); *infra* at 16 (discussing additional recent rulings). In such cases, the question whether

Section 851 imposes a "jurisdictional" requirement never arises.[2]

Thus, a defendant generally can receive relief under Eleventh Circuit precedent only when both (a) the Government fails to file the required notice, and (b) the defendant fails to raise the error in the district court. But a defendant in that circumstance can in any event receive relief from the courts – rendering the "jurisdictional" status of Section 851 irrelevant – through a claim of ineffective assistance of counsel. In fact, in the very case that the Government now applauds for engaging in a "careful analysis" of Section 851 and concluding that the statute is not "jurisdictional," Pet. 16, the First Circuit actually concluded that "because the section 851(a)(1) claim was a clear winner and presenting it would have risked nothing, counsel's eschewal of it amounted to constitutionally deficient performance." *Prou v.*

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[2] Eleventh Circuit precedent is consistent with decisions of other courts of appeals on the question of whether minor defects invalidate a Section 851 notice. *See, e.g., United States v. Curiale*, 390 F.3d 1075, 1076-77 (8th Cir. 2004) (per curiam) ("An information complies with the requirements of § 851(a) even if it contains an error in its contents as long as the information serves to convey the Government's intent to seek an enhancement based on a particular earlier conviction." (citing *Perez*, 249 F.3d at 1265)); *United States v. Weaver*, 267 F.3d 231, 247 (3d Cir. 2001) ("Accordingly, '[o]ur inquiry must be whether the information which was filed provided [the defendant] reasonable notice of the government's intent to rely on a particular conviction and a meaningful opportunity to be heard.'" (quoting *Perez*, 249 F.3d at 1266)).

United States, 199 F.3d 37, 48 (1st Cir. 1999) (granting relief under 28 U.S.C. § 2255).

Furthermore, the Government's complaint that the Eleventh Circuit's application of *de novo* review recognizes errors that other circuits would overlook on plain error review ignores that, given the clear and simple terms of Section 851, those other circuits in fact may deem such errors to be "plain." *See, e.g.*, *United States v. Hardin*, 108 Fed. Appx. 74, 79 (4th Cir. 2004) (unpublished) ("[I]t was plain error for the district court . . . to rely on offenses not noticed in the information filed by the government."); *see also Prou*, 199 F.3d at 48-49 (finding on collateral review that, when the government filed the Section 851 notice nineteen days after the jury was empaneled, "the government's blunder was manifest" and prejudicial to the defendant). Any disagreement among the circuits is thus inconsequential.

B. The Government Itself Can Ensure The Proper Application Of Section 851.

The question presented also lacks significance because it need *never* arise. Compliance with Section 851 lies completely within the control of the Government. So long as the prosecution follows the statutory requirements in the district court, the question whether its provisions are "jurisdictional" for purposes of appeal is entirely academic. That is significant because the requirement imposed by the statute is so straightforward and easy to comply with. The Government need only notify the court and the defendant of the prior convictions on which it relies in seeking an enhanced sentence. 21 U.S.C. § 851(a)(1). The Government may freely secure postponement of

the trial or guilty plea colloquy if it needs additional time. *Id.* Further, the prosecution may correct errors in the notice at any point before sentencing. *Id.*

Even when the Government does violate Section 851, the defendant's sentence is generally resolved by the terms of the plea agreement. Such an agreement regularly includes a waiver of the defendant's right to appeal the sentence to which he has just agreed. The position of the Government, supported by the only court of appeals to decide the question, is that such a waiver extinguishes the defendant's right to challenge the Section 851 notice on appeal. *See* Br. of United States at 20, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370 (citing *United States v. Rodriguez*, 137 Fed. Appx. 682 (5th Cir. 2005); *United States v. Anguiano*, 197 Fed. Appx. 342 (5th Cir. 2006)).

The Seventh Circuit recently summarized most of these points, in a characteristically blunt opinion by Judge Posner which demonstrates that the answer to the Question Presented lies in the hands of the Government itself:

> The government takes a risk by sloppy compliance (or perhaps it is not compliance at all) with section 851(a)(1): the risk that either the court will hold that the government failed to provide the defendant with adequate notice or that the defendant will have a claim that by failing to interpret a confusing notice correctly his lawyer rendered ineffective assistance of counsel. For these reasons and to spare us pointless appeals, the U.S. Attorney's office that prosecuted this case would be well advised to get its act together and comply strictly with

> section 851. It might also be wise for the Department of Justice to notify all the U.S. Attorneys of the importance of strict compliance, as the problem of non-compliance or sloppy compliance seems to be widespread, judging from the number of cases. And it is not as if strict compliance were difficult.

United States v. *Williams*, No. 09-1924, 2009 U.S. App. LEXIS 22496, at *13-*14 (7th Cir. Oct. 14, 2009).[3]

C. As The Government Has Previously Argued, This Court's Intervention Is Unwarranted Because The Law Of The Eleventh Circuit Is Unsettled.

It is difficult to conceive of a worse allocation of this Court's scarce time than to review an issue that affects only a single individual in the entire country once every ten years, particularly when the Government can address its concerns by following the simple terms of the statute and when the "relief" to which the Government objects is (as in this case) the imposition of a lengthy twenty-five-year term of imprisonment. Instead, this Court should follow the view consistently advanced by the Government in

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[3] There is no inconsistency between Judge Posner's point that appeals under Section 851 arise with some regularity and respondent's point that defendants almost never receive relief even under the *de novo* standard adopted by the Eleventh Circuit in *Harris*. Instead, the fact that the issue continues to arise even in the Seventh Circuit (which applies the rule endorsed by the Government) illustrates that the application of plain error review does not reduce the number of appeals filed by defendants and thus does not produce any greater efficiency.

"oppos[ing] petitions for a writ of certiorari in several cases presenting this issue," Pet. 18, until it lost this one case in an unpublished opinion: this question does not require this Court's intervention. *See* Br. in Opp. at 13-14, *Beasley v. United States*, 128 S. Ct. 1471 (2008) (No. 07-548);[4] *see also* Br. in Opp. at 8-9, *Severino v. United States*, 540 U.S. 837 (2003) (No. 02-10095); Br. in Opp. at 7-8, *Quintanilla v. United States*, 538 U.S. 926 (2003) (No. 02-7455).

Among other things, the Government has correctly and successfully urged this Court to allow the Eleventh Circuit to reconsider its decision in *Harris* in light of this Court's intervening precedents. Nothing about the ruling in this case changes that calculus. If the Government's arguments in its petition have merit, the Eleventh Circuit panel would have been fully empowered to reconsider *Harris*. *See, e.g.*, *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993) ("It is the law of this Circuit that a subsequent panel is not obligated to follow a prior panel's decision where an intervening Supreme Court decision establishes that the prior panel decision is wrong."). In fact, other circuits have reconsidered this very issue without resorting to en banc review. *See, e.g.*, *United States* v.

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[4] The Government's opposition in *Beasley* asserted, at 7-8, that the case was an inappropriate vehicle to decide the question presented because the defendant's sentence did not depend on an enhancement under Section 851. Subsequently, however, the Solicitor General withdrew that argument, recognizing that it was erroneous. *See* Letter from Paul D. Clement, Solicitor Gen., to William K. Suter, Clerk of the Supreme Court of the U.S. (Feb. 19, 2008), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2008/02/beasley-correction-letter.pdf.

Flowers, 464 F.2d 1127, 1130 n.1 (10th Cir. 2006); *United States* v. *Ceballos*, 302 F.3d 679, 692 n.4 (7th Cir. 2002). But for reasons known only to itself, the Government chose *not* to make that request, either in its initial briefing or in its petition for rehearing.

The Government instead only invited en banc review of the vitality of *Harris*, which was denied. But that creates no inference that the Eleventh Circuit's position is settled. Given the utter triviality of the issue, *see supra*, it is not surprising that the full court decided that the issue did not warrant its attention, given that the opinion in this case is unpublished and nonprecedential, and a later panel remains free to reconsider the question if and when – in another decade or so – another defendant could receive relief on the basis of *de novo* review.

The Government's contrary assertion that "[t]he Eleventh Circuit has repeatedly declined invitations to reconsider its position," Pet. 18, is a significant overstatement and somewhat revisionist history. The Government apparently filed rehearing requests only a decade ago in *Harris* (prior to the decisions of this Court on which the Government relies) and in the unpublished ruling in this case. As discussed above, the Government has repeatedly (and successfully) urged the denial of certiorari on precisely the ground that the Eleventh Circuit has *not* been provided with an appropriate opportunity to reassess *Harris*. Given the Government's curious failure to put that question before the panel in this case, its prior consistent position that this Court's intervention would be premature remains entirely sound.

For related reasons, the Government's newfound assertion in this Court that Eleventh Circuit precedent

is fixed is also an overstatement. In opposing review in *Beasley*, *supra*, the Solicitor General found it noteworthy that the Eleventh Circuit had only even "restated" the holding of *Harris* in a published ruling "in *dicta*." Br. in Opp. 14 n.7. Of particular note, the Government continues to maintain in its briefs in the Eleventh Circuit that the court of appeals' *existing* precedent provides that objections to notices under Section 851 that are *not* first raised in the district court are nonetheless "review[ed] . . . for plain error." Br. of United States at 24-25, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370 (citing *United States v. King*, 73 F.3d 1564, 1572 (11th Cir. 1996)). Thus, in this Court, the Government urges review by broadly characterizing *Harris* as holding that "the government's failure to file a notice *in full compliance* with the requirements of 21 U.S.C. 851(a) divests a district court of 'jurisdiction' to impose an enhanced sentence on a recidivist drug offender." Pet. 11 (emphasis added). But in the Eleventh Circuit itself, the Government reads *Harris* as much more narrowly limited to circumstances in which "the prosecutor filed the § 851 notice after the plea hearing, not before it," such that whenever the notice is timely filed (*even if erroneous*), "*Harris* does not provide support for [the] Defendant's argument." Br. of United States at 29, No. 08-15488, *United States v. Brown*, 2009 U.S. App. LEXIS 21370. Thus, in cases involving alleged errors in the substance of the notice as opposed to its timely filing, "[b]ecause there is no clear statutory or precedential authority which clearly states that the Government's notice would not be sufficient, the district court cannot be found to have plainly erred." *Id.* at 30.

Cases handed down since the Government filed its petition only reinforce the wisdom of awaiting further developments in the Eleventh Circuit. That court's two most recent rulings on the question narrowly construe a defendant's right to relief under Section 851 and note the unsettled state of its precedents, indicating that this case is arguably anomalous. In *United States v. Anthony*, an Eleventh Circuit panel applied *Perez* to hold that a Section 851 notice was sufficient despite its failure to identify the date of the prior conviction or the relevant statutory provision supporting the enhancement. The panel notably deemed the defendant's reliance on the decision in the instant case to be "misplaced" because the circuit is "not bound by unpublished opinions." BIO App. 13a.

Another Eleventh Circuit panel – which included two of the judges from this case – then also applied *Perez* to uphold a Section 851 notice on facts similar to the present case, reasoning that the Government's erroneous citation of a penalty provision was a "technical error," and that the Government's intent remained unambiguous because the correct enhancement provision was listed in the plea agreement and was acknowledged by the defendant at his plea hearing and sentencing. *United States v. Brown*, BIO App. 28a-29a.

Notably, those same judges recognized the "thorny jurisdictional and waiver issues" that arise in cases involving Section 851, and took care to note that the Eleventh Circuit had "not had an opportunity" to consider the effect, if any, of *Harris* because the court's determination that a technical error does not invalidate the statutory notice meant that the

defendant's appeal "lack[ed] merit in any event." BIO App. 27a.

II. This Is A Poor Vehicle In Which To Decide The Question Presented.

Even if it were appropriate in some case to grant certiorari to decide the Question Presented, this is a uniquely poor vehicle in which to do so. There is a very real prospect that the Court would never reach the issue of whether Section 851 is a "jurisdictional" statute.

The Government's principal position throughout this case has been that it never violated Section 851 in the first place. In the Eleventh Circuit, the Government argued that the "enhancement information satisfied the requirements of 21 U.S.C. § 851(a)(1)." U.S. C.A. Br. 13. The citation of the wrong sentencing enhancement, the Government argued, was not a violation because "section 851(a)(1) does not require an enhancement information to provide notice of the penalty provisions of section 841." U.S. C.A. Br. 19. The incorrect date of respondent's conviction was merely a technical error, the Government continued, because the information still unambiguously signaled the government's intent and did not confuse respondent about which convictions were being relied upon. U.S. C.A. Br. 19; *see Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001).

As discussed above, rulings in the Eleventh Circuit in the wake of the unpublished decision in this case suggest considerable sympathy for the Government's view of the narrow class of errors that will invalidate an enhanced sentence under Section 851. If this Court were to agree with those more

recent Eleventh Circuit rulings, that narrow ground of decision would make it unnecessary for this Court to reach the Question Presented: whether challenges to notices under Section 851 are subject to *de novo* or instead plain error review when not first raised in the district court. As the Government has forthrightly acknowledged, the precise circumstances in which a notice comports with Section 851 has "no importance beyond the particular circumstances of th[e] case and therefore does not warrant this Court's review." Br. in Opp., *Severino*, *supra*, at 12.

The Government's petition relies heavily on the facts supporting its central argument that "the defects in the information" did not violate Section 851. Pet. 23. But even if the Government itself attempted to limit its own argument to the question whether Section 851 is a "jurisdictional" statute, there is every reason to believe that the Court would appropriately first consider the narrower ground of decision on which the Government principally relied below – namely, whether the statute was violated in the first instance. *Cf. United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (where the Government sought to present only the question whether errors in an indictment are subject to harmless error analysis, deciding the case instead on the narrower ground that the indictment in fact contained no error). And in analogous circumstances, the Solicitor General has successfully opposed review of the Question Presented when the determination that "the government did comply with the requirements of Section 851(a)," made it "unnecessary to decide 'whether a section 851(a) error can be waived or forfeited.'" Br. in Opp. *Severino*, *supra*, at 8 (citation omitted).

Instead, the Court should decide the Question Presented, if ever, when it is presented in a case that does not raise a substantial issue regarding the antecedent question whether Section 851 was violated at all. Such a case would arise when the Government either fails to provide notice of the enhancement, or fails to do so "before trial [or] before entry of a plea of guilty." 21 U.S.C. § 851(a)(1). Such a case would squarely present the question of whether that error should be reviewed *de novo*.

Granting review in such a case, unlike this one, would also have the benefit of resolving a circuit conflict over the consequences of an untimely Section 851 information. In *Prou v. United States*, 199 F.3d 37 (1st Cir. 1999), the First Circuit held that the government's failure to file the information until nineteen days after the jury had been empaneled was prejudicial error, and granted relief under 28 U.S.C. § 2255. In contrast, the Fifth Circuit held in *United States v. Dodson*, 288 F.3d 153 (5th Cir.), *cert. denied*, 537 U.S. 888 (2002), that the Government's failure to file any notice at all did not even amount to plain error, and denied the defendant relief on direct appeal.

Finally, the procedural posture in this case adds a further layer of complication that makes it an undesirable vehicle. After his initial sentencing, respondent failed to file a timely appeal. Only after he succeeded in a motion under 28 U.S.C. § 2255 arguing that his counsel was constitutionally ineffective was respondent able to appeal to the Eleventh Circuit, resulting in the decision below. This adds an additional element of uncertainty regarding the appropriate standard of review in this particular case.

III. The Eleventh Circuit's Decision Was Correct On The Merits.

A. This Court's Recent Precedents Support The Eleventh Circuit's Decision And Demonstrate That Summary Reversal Is Inappropriate.

Implicitly recognizing the triviality of its request for plenary review, the Government invites the Court to summarily reverse the court of appeals' unpublished ruling. Summary reversal, however, is "usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). *See also Spears v. United States*, 129 S. Ct. 840, 845 (2009) (Roberts, C.J., dissenting) (referring to summary reversal as "bitter medicine"); *Brosseau v. Haugen*, 543 U.S. 194, 207 (2004) (Stevens, J., dissenting) (calling it an "extraordinary remedy"). The Government is wrong to request such a potent potion here because no decision of this Court dictates the outcome of this case.

The Government bases that request on the erroneous assertion that the Eleventh Circuit's approach is out of step with an inexorable trend toward a singular, narrow definition of "jurisdictional." Pet. 12-15. In fact, this Court's precedent – particularly *Bowles v. Russell*, 551 U.S. 205 (2007) – supports the ruling below. *Bowles* is this Court's most on-point recent decision, yet it receives no mention in the Government's petition. In *Bowles*, the Court held that a party's filing of a notice of appeal outside the prescribed time limit of Federal Rule of Appellate

Procedure 4(a)(1)(A) and 28 U.S.C. § 2107(a) was a jurisdictional defect. The Court drew a "distinction between court-promulgated rules and limits enacted by Congress," finding the latter jurisdictional in nature. 551 U.S. at 211-12.

Section 851 necessarily falls on the statutory – and therefore jurisdictional – side of the ledger. Indeed, the logic behind this Court's holding in *Bowles* applies here. In both cases, Congress exercised its authority to establish procedural prerequisites to the invocation of a court's powers. In both cases, the failure to follow that requirement ran contrary to the statutory purpose of providing proper notice to opposing parties. As this Court recognized, "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Bowles*, 551 U.S. at 212-13. In adopting Section 851, Congress allowed courts to issue significantly enhanced punishments, but *only* upon the proper filing of an accurate information by the prosecutor. In other words, Section 851 embodies Congress's ability to determine "under what conditions" federal courts can hear cases and was therefore properly determined by the Eleventh Circuit to be jurisdictional.

Similarly, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), another case the Government ignores, the Court held that 28 U.S.C. § 2501, a statute of limitations governing the Court of Federal Claims, requires a court to raise *sua sponte* the timeliness of a lawsuit. The Court relied on the strict language in the provision, which mandates that all claims over which the Court of Federal Claims "has jurisdiction shall be barred" unless filed within six

years. 552 U.S. at 755. The Court further noted that such absolute time limits – which can also serve broader goals such as "facilitating the administration of claims" or "promoting judicial efficiency" – were sometimes referred to as "jurisdictional." *Id.* at 753.

It would be particularly inappropriate and unfair to invoke the bitter medicine of summary reversal in this case, subjecting respondent to a life in prison, when the Solicitor General has elected not to discuss in the petition either of the two cases that most undercut the Government's position – *Bowles* and *John R. Sand & Gravel Co.* – thereby depriving respondent of any opportunity to address the Government's view of those central decisions.

The precedents that the Government does discuss – *Kontrick v. Ryan*, 540 U.S. 443 (2004), *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), and *United States v. Cotton*, 535 U.S. 625 (2002) – all predate both *Bowles* and *John R. Sand & Gravel Co.* and are distinguishable from this case. In *Kontrick*, this Court held that Bankruptcy Rules 4004 and 9006 – which do not have a statutory origin – are not jurisdictional. 540 U.S. at 453-54 (noting that the rules are court-prescribed, and holding that they are "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate"). *Eberhart* merely follows *Kontrick*, again holding that non-statutory-based rules – Federal Rules of Criminal Procedure 33 and 45 – were non-jurisdictional. 546 U.S. at 15 ("The Rules we construed in *Kontrick* closely parallel those at issue here."). *Bowles* thus highlights that recent decisions – including *Kontrick* and *Eberhart* – have "recognized the jurisdictional significance" of a statutory origin. 551 U.S. at 210.

The Court's decision in *Cotton* similarly does not dictate the outcome of this case. This case involves a heightened statutory requirement governing the prosecutor's conduct. In *Cotton*, on the other hand, this Court considered whether, in the wake of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a deficient indictment could lead to an enhanced sentence. The defendants in *Cotton* were charged under the wrong section of 21 U.S.C. § 841, which delineates penalty levels for drug crimes. 535 U.S. at 627-28. However, the prosecutors in that case failed to meet the Court-ordered requirements of *Apprendi* – not the terms of the statute itself. Section 851, by contrast, establishes congressionally created mandates governing the content to be included in an information. The mere fact that all of the cases cited by petitioner contain language guarding against the overuse of the term "jurisdictional" is of no moment. The term is properly applied here.

Summary disposition of this case would be particularly inappropriate because of its potential to undercut the doctrinal clarity that has emerged in the wake of this Court's ruling in *Bowles*. The line of demarcation drawn by this Court has been widely noted and embraced in the lower courts. *See, e.g.*, *Dill v. Gen. American Life Ins. Co.*, 525 F.3d 612, 617 (8th Cir. 2008) (citing *Bowles* for the proposition that "[t]ime limits prescribed by statute are jurisdictional"); *United States v. Griffin*, 524 F.3d 71, 84 (1st Cir. 2008) (citing *Bowles* and holding that Federal Rule of Criminal Procedure 35(a) is jurisdictional because it is incorporated into a statute); *United States v. Frias*, 521 F.3d 229, 233 (2d Cir. 2008) (holding that Federal Rule of Criminal Procedure 4(b) is not jurisdictional

because its origins are not statutory); *United States v. Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007) (same).

By contrast, the Government is unable to identify any question of broader significance that the summary disposition of this case would help to resolve, or any other reason to believe that a ruling in its favor would be useful to the lower courts. The Government asserts that the isolated result in this case "conflicts with basic principles of fairness and efficiency in judicial practice." Pet. 21. But that type of complaint is not a recognized basis for this Court's intervention. *See* S. Ct. R. 10.

There is thus a striking contrast between the appropriate disposition of this case and *Eberhart*, the illustrative summary reversal cited by the Government. Pet. 23. *Eberhart* addressed whether noncompliance with Federal Rule of Criminal Procedure 33's deadline for new trial motions was "jurisdictional." *See* 546 U.S. at 13. That issue is of surpassing importance: it has the potential to arise in the wake of *any* federal criminal conviction. By contrast, as noted, respondent is the only defendant to whom the Eleventh Circuit has granted relief on the ground that Section 851 is a jurisdictional statute in the past decade. Further, the Seventh Circuit in *Eberhart* had all but invited summary reversal, noting that the vitality of its own precedent was doubtful but stating that it was bound to follow it "'until expressly overruled by the Supreme Court.'" *Id.* at 14-15 (quoting *United States v. Eberhart*, 388 F.3d 1043, 1049 (7th Cir. 2004)). Here, by contrast, the status of the Eleventh Circuit's precedent is uncertain and there remains a substantial prospect that the court of

appeals will later revisit its position. Finally, in *Eberhart*, there was a "close[] parallel" between the relevant rules of criminal procedure and the bankruptcy rules at issue in *Kontrick*. *Eberhart*, 546 U.S. at 15. No such parallel exists here. Unlike *Eberhart* and *Kontrick*, this case involves a statutory mandate, which under *Bowles* amounts to a jurisdictional requirement.

B. The Eleventh Circuit's Decision Properly Comports With The Statute's Plain Language And Congressional Intent.

The Eleventh Circuit's decision to "require strict compliance" with the procedural and substantive requirements of the statute, Pet. App. 2a, conforms to the statutory text, as well as the purpose of Section 851. Congress expressly prohibited courts from issuing an enhanced statutory penalty unless "the United States attorney files an information with the court . . . stating in writing the previous convictions *to be relied upon*." 21 U.S.C. § 851(a)(1) (emphasis added). By incorrectly citing both the applicable sentencing enhancement *and* respondent's relevant prior conviction, the prosecution failed to satisfy that statutory requirement.

This Court has long recognized that improper notice can trigger a due process violation. *See Oyler v. Boles*, 368 U.S. 448, 452 (1962) (holding that in a criminal proceeding, due process guarantees the "right to reasonable notice and opportunity to be heard" regarding sentence enhancements); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the

Due Process Clause."). The notice provision in Section 851 was installed as a bulwark against precisely these concerns, as multiple courts of appeals have expressly recognized. *See, e.g.*, *United States v. Morales*, 560 F.3d 112, 116 (2d Cir. 2009) ("[I]gnoring a misleading government statement of potential penalties would create serious due process issues if it interfered with the defendant's preparation for trial or caused him or her not to plea bargain for a lesser sentence."); *United States v. Mayfield*, 418 F.3d 1017, 1020 (9th Cir. 2005) ("Section 851(a) was enacted to fulfill the due process requirements of reasonable notice and an opportunity to be heard with regard to the prior conviction." (citing *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1485 (10th Cir. 1994)); *United States v. Curiale*, 390 F.3d 1075, 1076 (8th Cir. 2004) ("The statute aims to give the defendant notice to comply with due process." (citing *United States v. Weaver*, 267 F.3d 231, 247 (3d Cir. 2001)). Considering the strict requirements of Section 851 – and the grave underlying constitutional considerations – the Eleventh Circuit rightly recognized and disallowed the potential for faulty notice in cases such as this one where the prosecution commits multiple errors.

Congress had broad, systemic goals in enacting Section 851. The provision struck a balance between the authority of prosecutors to seek enhanced statutory penalties – penalties that can dramatically increase a defendant's term of imprisonment – and the need to provide procedural protections to defendants. But by enacting this law and "eliminating some of the difficulties" faced by prosecutors, H.R. Rep. No. 91-1444, at 4576 (1970), Congress in turn required the

Government to comply with the exacting language of the new provision.

In this case, the Eleventh Circuit's decision corrects the prosecution's failure to uphold its end of the statutory bargain. The Government has expressly recognized that its "notice contained significant errors that made it ambiguous." Br. for United States at 38, No. 08-14370, *United States v. Anthony*, 2009 U.S. App. 20194 (11th Cir. Sept. 10, 2009). Sustaining the notice in the face of that ambiguity would have displaced the careful balance that Congress struck and, in effect, permitted a sentence to be imposed in a manner that Congress forbade. Strict observance of the requirements of Section 851 is required to give effect to Congress's determination that the decision whether to seek an enhancement belongs to the prosecution and not to the courts. As the Fifth Circuit recognized thirty-five years ago in *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974), "[i]n granting this discretion to the prosecution, Congress imposed a strict condition on its exercise." Both the extent of that discretion and the strict limits on how it may be exercised demonstrate Congress's intent that executive branch compliance with Section 851 be necessary to trigger the jurisdiction of the courts. *See United States v. Cespedes*, 151 F.3d 1329, 1333-34 (11th Cir. 1998).

This Court has held that the decision to provide notice under Section 851 is similar to a charging decision. That is, the "discretion [to determine whether a particular defendant will be subject to the enhanced statutory maximum] is an integral feature of the criminal justice system." *United States v. LaBonte*, 520 U.S. 751, 762 (1997); *see also Cespedes*, 151 F.3d

at 1333. A court has no greater jurisdiction to enter an enhanced statutory sentence based on a defective information from the prosecution than it would have to enter a judgment of conviction in the absence of a criminal charge. Like charging decisions, the decision to file a Section 851 notice is within the discretion of the executive branch, and courts cannot exercise jurisdiction to undermine that discretion. *See In re Ellis*, 356 F.3d 1198, 1209-10 (9th Cir. 2004). The government's contention that Section 851 "does not affect a court's power to entertain the case," Pet. 12, is thus far too sweeping to be accurate, and is a product of the Government's artificially narrow concept of "jurisdiction." Section 851 directly affects the court's power to entertain cases where the prosecutor must first meet the mandatory threshold of filing a timely and accurate information – a prerequisite that was not met here.

Congress knowingly raised the stakes for both sides by implementing Section 851. The Eleventh Circuit's current precedent allows the court to vindicate the importance of the notice function of Section 851 while appropriately distinguishing cases where that function was not undermined. *See United States v. Brown*, BIO App. 29a (finding that "[d]espite the citation error, Brown was fully aware" of the proper penalty provisions); *United States v. Anthony*, BIO App. 14a (noting that the defendant indicated "that he was not confused by the failure to list" the proper statutory provision in the information). The Eleventh Circuit's fact-bound ruling in this case properly comports with Congressional intent and the plain language of this statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-11935
Non-Argument Calendar

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
V.
MICHAEL ANTHONY, DEFENDANT- APPELLANT

Jan. 7, 2009

PER CURIAM:

Michael Lamar Anthony appeals his convictions and 120-month sentences for possession with intent to distribute crack, cocaine, heroin, and marijuana, in violation of 21 U.S.C. § 841. Anthony now appeals, arguing (1) the court erred by denying his motion to suppress evidence seized from his apartment; (2) various improper statements at trial by the court and prosecutor amounted to misconduct and prejudiced his case; and (3) the notice of enhanced penalties was insufficient under 21 U.S.C. § 851 to confer jurisdiction. After a thorough review of the record and the parties' briefs, we affirm.

1. Motion to Suppress

"A district court's ruling on a motion to suppress presents a mixed question of law and fact." *United States v. Zapata*, 180 F.3d 1237, 1240 (11th Cir. 1999). We accept the district court's findings of fact to be true, unless shown to be clearly erroneous, and review *de novo* the district court's application of the law to those facts. *Id.* "[A]ll facts are construed in the light most favorable to the prevailing party below." *United States v. Bervaldi*, 226 F.3d 1256, 1262 (11th Cir. 2000). "The individual challenging the search bears the burdens of proof and persuasion." *United States v. Cooper*, 133 F.3d 1394, 1398 (11th Cir. 1998). In reviewing the denial of a motion to suppress, we may consider the entire record. *United States v. Newsome*, 475 F.3d 1221, 1224 (11th Cir. 2007).

Although the Fourth Amendment shields one's home from unreasonable searches and seizures by law enforcement officers, "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943, 1947 (2006). One exception is a warrantless search made pursuant to voluntary consent. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Katz v. United States*, 389 U.S. 347, 357 (1967). Consent is voluntary "if it is the product of an 'essentially free and unconstrained choice.'" *United States v. Purcell*, 236 F.3d 1274, 1281 (11th Cir. 2001) (quotation omitted). The government bears the burden of proving the existence of valid consent – that the consent was given voluntarily and not in acquiescence to a claim of lawful authority. *United States v. Blake*, 888 F.2d 795, 798 (11th Cir.

1989). Consent "usually turns on credibility choices resulting from conflicting testimony." *United States v. Gonzalez*, 71 F.3d 819, 828 (11th Cir. 1996) (internal quotations marks omitted). Credibility determinations are within the province of the fact finder "because the fact finder personally observes the testimony and is thus in a better position than a reviewing court to assess the credibility of witnesses." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). We "must accept the evidence unless it is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." *Id.* (alteration in original) (quotation omitted).

In this case, Miami-Dade Police Detective Kevin Richardson, Detective William Padraja, and Sergeant Jose Ramirez testified that they went to Anthony's apartment after receiving an anonymous tip. Catherine Cannady, Anthony's mother and the lease holder on the apartment, answered the door, invited them in, and gave both written and verbal consent to search the apartment. Cannady was calm and cooperative and was not pressured or coerced to give consent. Cannady escorted the officers to the bathroom where they spoke with Anthony, who identified his bedroom and gave verbal consent to a search. Police found drugs, drug paraphernalia, and a firearm. Anthony was arrested and given his rights, after which he admitted the contraband was his and stated that his mother knew nothing about it. Police also searched the bathroom and found more drugs, which Anthony also admitted were his.

Cannady testified that when she opened the door, there were about seven or eight officers there. One of the officers slid his foot over the threshold so she could

not close the door. After the officers entered the apartment, one officer pushed a form at her. She was very nervous, did not know what the form was, and felt pressured to sign it. Although she allowed the police entry into her home and permitted them to look around, she did not think she had given consent to a search. Nevertheless, she admitted that she had written her address on the consent form and had signed and dated it. She also admitted that she signed the form where it indicated that consent had been given freely.

Upon review, we conclude the district court properly denied the motion to suppress. The magistrate judge explained that the officers' testimony was more credible than Cannady's.[1] Viewing the evidence in the light most favorable to the government, the testimony established that three officers arrived at Anthony's apartment, identified themselves, and informed Cannady that they were investigating a tip. Cannady invited them in; she was calm and cooperative as she signed the consent form and led the officers through the house. On these facts, Anthony has not shown that the initial entry into the apartment or the subsequent consent to search was invalid. *See United States v. Ramirez-Chilel*, 289 F.3d

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[1] In his motion to suppress and objections to the magistrate judge's recommendation, Anthony argued that the consent was involuntary but did not explicitly argue that the initial entry was invalid. In a single sentence, which is insufficient to preserve the issue, Anthony stated that seven or eight officers arrived at the house and one officer placed his foot in the door to prevent Cannady from closing it. He offered no law to argue that this entry was illegal or non-consensual. Nevertheless, a review of the evidence establishes that the initial entry into the apartment was consensual and not the result of coercion or a show of authority.

744 (11th Cir. 2002) (deferring to magistrate judge's credibility determination where magistrate judge explained reasons for finding police more credible and report indicated that magistrate judge had considered all the testimony).

2. Alleged Errors at Trial

Anthony argues that the following instances of prosecutorial and judicial misconduct prejudiced his case: (1) the court's explanation of the charges against Anthony during opening statements, stating "if I may put it in this fashion for the jury to understand, operating sort of a pharmacy or drug store"; (2) the prosecutor's reference in opening statements that "in the words of a convicted felon," Anthony admitted his possession of the gun and drugs; (3) the court's refusal to allow defense counsel to offer its view of the evidence during opening statements; and (4) the prosecutor's reference in rebuttal to Anthony going home, which implied that he was in custody. According to Anthony, the cumulative effect of these errors compels reversal of his convictions.

We review a judge's comment on evidence for an abuse of discretion. *See, e.g.*, *United States v. Berdick*, 555 F.2d 1329, 1330 (5th Cir. 1977).[2] Allegations of prosecutorial misconduct present mixed questions of fact and law that are reviewed *de novo*. *United States*

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), this court held that all decisions handed down by the former Fifth Circuit before the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit.

v. Noriega, 117 F.3d 1206, 1218 (11th Cir. 1997). We review a claim that the district court improperly limited a defendant's opening statement for an abuse of discretion. *See United States v. Burns*, 298 F.3d 523, 543 (6th Cir. 2002) (stating a district judge's conduct of a trial, including opening statements, is reviewed for an abuse of discretion) (persuasive authority). The denial of a motion for a mistrial is reviewed for abuse of discretion. *United States v. Campa*, 529 F.3d 980, 992 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 2790 (2009). When a defendant fails to object to an error before the district court, we review the argument for plain error. *United States v. Hall*, 314 F.3d 565, 566 (11th Cir. 2002); *see also United States v. Olano*, 507 U.S. 725, 731-32 (1993). "Plain error occurs where (1) there is an error; (2) that is plain or obvious; (3) affecting the defendant's substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Hall*, 314 F.3d at 566; *Olano*, 507 U.S. at 732.

a. The court's statement

Anthony challenges the district court's statement to the jury that Anthony was operating a drug store. Because Anthony failed to object at trial, we review this issue for plain error.

Remarks may constitute error if they (1) were improper and (2) prejudiced the defendant's substantive rights. *United States v. Delgado*, 56 F.3d 1357, 1368-1369 (11th Cir. 1995). Furthermore, "[a]

clear effect on the jury is required to reverse for comment by the trial judge." *United States v. Morales*, 868 F.2d 1562, 1576 (11th Cir. 1989). "[I]n order to amount to reversible error, a judge's remarks must demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case." *United States v. Ramirez-Chilel*, 289 F.3d 744, 750 n.6 (11th Cir. 2002); *see also United States v. Verbitskaya*, 406 F.3d 1324, 1337 (11th Cir. 2005).

Here, the court's statement was a single, isolated comment. The jury heard testimony that Anthony admitted possession of the drugs. In light of this evidence, Anthony cannot show that he was prejudiced by the court's comment.

b. The prosecutor's opening statement

Anthony next challenges the prosecutor's reference during open statement to Anthony's status as a convicted felon. Again, we review this claim for plain error.

Prosecutorial misconduct is a basis for reversing an appellant's conviction only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused. *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1198 (11th Cir. 2000). When we review an issue of prosecutorial misconduct, we must determine (1) whether the challenged comments were improper and (2) if so, whether they prejudiced the defendant's substantial rights. *United States v. Paul*, 175 F.3d 906, 909 (11th Cir. 1999). "A defendant's substantial rights are prejudicially affected when a

reasonable probability arises that, but for the remarks, the outcome of the trial would have been different." *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006). "This court gives 'considerable weight to the district court's assessment of the prejudicial effect of the prosecutor's remarks and conduct.'" *Cordoba-Mosquera*, 212 F.3d at 1198 (internal citation omitted). When the record contains sufficient independent evidence of guilt, such error is usually harmless. *United States v. Adams*, 74 F.3d 1093, 1097-98 (11th Cir. 1996).

Here, the prosecutor stated in opening remarks that Anthony was a convicted felon who had admitted possession of the drugs. During trial, Anthony stipulated that he had a prior felony conviction. The jury then heard testimony that Anthony admitted possessing the drugs. Anthony cannot show that the alleged error resulted in prejudice.

c. Defense counsel's opening statement

Anthony next challenges the court's limitations on defense counsel's opening statement. An opening statement gives counsel the opportunity to state what evidence will be presented in order to make it easier for the jurors to understand what is to follow, and is not an occasion for argument. *United States v. Zielie*, 734 F.2d 1447, 1455 (11th Cir. 1984), *abrogated on other grounds by United States v. Chestang*, 849 F.2d 528, 531 (11th Cir. 1988). "The scope and extent of the defendant's opening statement rests largely in the discretion of the trial court." *United States v. Freeman*, 514 F.2d 1184, 1192 (10th Cir. 1975)

(persuasive authority). The court "can exclude irrelevant facts and stop argument if it occurs." *Zielie*, 734 F.2d at 1455.

Here, defense counsel's statements constituted argument and did not inform the jury as to the evidence it would hear. Accordingly, the district court's warnings to defense counsel were proper.

d. Rebuttal

Anthony contends that the prosecutor's reference to Anthony "going home tonight" was an impermissible statement that Anthony was in custody. In order to succeed on appeal, Anthony must show that the statement was improper and that, in the context of the entire trial, the improper statement prejudiced his substantial rights. *Cordoba-Mosquera*, 212 F.3d at 1198.

This court has expressed concern over the potential prejudice arising from the jury's knowledge that the defendant has been incarcerated while awaiting trial. *United States v. Harris*, 703 F.2d 508, 510 (11th Cir. 1983) (concluding that a defendant's appearance at trial dressed in prison clothes prejudiced the jury but explaining that reversal was not warranted if the error was harmless beyond a reasonable doubt). A brief utterance or comment of the word "jail," "prison," or "custody," however, does not constitute *per se* reversible error. *See United States v. Villabona-Garnica*, 63 F.3d 1051, 1058 (11th Cir. 1995).

Here, Anthony's cousin, Tremaine King, testified that he had obtained the gun the day before the arrest

and had brought it into the bedroom. After the defense reminded the jury in closing argument that Tremaine admitted the gun was his, the government in rebuttal asserted that Tremaine's testimony was simply that of a young boy trying to protect his cousin, "to try to let his cousin go home tonight too."

Upon review, we conclude the prosecutor's rebuttal argument did not violate due process. First, it was a single comment and did not directly reference — or arguably even imply — Anthony's custody status. Second, the jury was instructed that what the lawyers say is not evidence, and we presume the jury followed its instructions. *United States v. Simon*, 964 F.2d 1082, 1087 (11th Cir. 1992). Third, the evidence against Anthony was overwhelming. Accordingly, Anthony cannot show that the statement resulted in prejudice.

e. Cumulative effect

"[T]he cumulative effect of several errors that are harmless by themselves could so prejudice the defendant's right to a fair trial that a new trial might be necessary." *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). "In addressing a claim of cumulative error, [this court] must examine the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial." *United States v. Calderon*, 127 F.3d 1314, 1333 (11th Cir. 1997). Where there is no error or only a single error, there can be no cumulative error. *See United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004).

Because, as discussed above, there were no errors, there could be no cumulative error. *Waldon*, 363 F.3d at 1110.

3. Sentencing Enhancement

Anthony argues that the district court lacked jurisdiction to impose the mandatory minimum sentence for the crack cocaine offense because the government's § 851 notice failed to identify the date of the prior conviction or the relevant statutory provision supporting the enhancement.

Relevant to the issue of notice, Anthony was indicted for possession with intent to distribute five grams or more of crack, in violation of 21 U.S.C. § 841(a) and (b)(1)(B). Prior to trial, the government filed a notice of enhanced penalties under 21 U.S.C. § 851 because Anthony had a prior conviction. The notice identified the prior offense as a conviction "in Miami-Dade County, Miami, Florida, in case number F01-039526 (Cocaine Possession with Intent to Sell/Deliver & Cannabis Possession with Intent to Sell/Deliver)."

We review *de novo* questions regarding the adequacy of a § 851 notice. *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007).

Section 851(a)(1) provides:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United

> States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon. . . . Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

21 U.S.C. § 851(a)(1). The purpose of § 851(a)(1) is to "allow the defendant to contest the accuracy of the information . . . [and] to have ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *United States v. Williams*, 59 F.3d 1180, 1185 (11th Cir. 1995).

The § 851 "notice requirement is jurisdictional: unless the government strictly complies, the district court lacks jurisdiction to impose the enhanced sentence."[3] *United States v. Jackson*, 544 F.3d 1176, 1184-85 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 1925 (2009); *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007); *United States v. Thompson*, 473 F.3d 1137, 1144 (11th Cir. 2006). When a notice of enhancement contains minor errors, this court will find § 851 compliance as long as the notice, despite the errors, unambiguously signaled the government's intent. *Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001).

Importantly, the text of the statute does nothing more than require the government to file notice before trial or entry of a guilty plea; it does not specify how to satisfy the notice requirement. To answer this

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[3] Although Anthony did not challenge the adequacy of the notice before the district court, because the issue is jurisdictional, Anthony can raise it at any time. *United States v. Giraldo-Prado*, 150 F.3d 1328, 1329 (11th Cir. 1998).

question, this court has considered the purpose behind the notice requirement. *See Ramirez*, 501 F.3d at 1239.

Here, the notice was filed prior to trial and identified the prior conviction by case number, offense, and venue. Contrary to Anthony's claim, this was sufficient to meet the first purpose of the notice requirements and enabled Anthony to contest the accuracy of the information.

The question is whether the notice meets the second requirement, the identification of the relevant statute. There is no dispute that the notice failed to identify the statute under which the enhanced penalty fell. Section 841(b) allows for enhanced penalties ranging from a ten-year mandatory minimum to life imprisonment depending on the amount of drugs involved and the type of prior conviction. *See* 21 U.S.C. § 841(b)(1)(A), (B), (C).

In this case, the indictment charged Anthony with possession with intent to distribute five grams or more of crack in violation of § 841(b)(1)(B). Thus, Anthony should have known that he faced an enhanced sentence of ten years' imprisonment based on the amount of drugs and his prior felony conviction. Moreover, Anthony conceded at sentencing that he faced the ten-year mandatory minimum sentence, indicating that he was not confused by the failure to list the statutory provision in the § 851 notice.[4] On

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[4] Anthony's reliance on *United States v. Bowden*, 2009 U.S. App. LEXIS 281, 2009 WL 32755 (11th Cir. Jan. 7, 2009), is misplaced. We are not bound by unpublished opinions. Nevertheless, the facts of the case are distinguishable. In *Bowden*, the notice listed the wrong conviction date and the wrong enhancement statute. In contrast, here, the government

these facts, we conclude the notice was sufficient to meet the purposes of § 851 when considered in conjunction with the indictment.

For the foregoing reasons, we affirm Anthony's convictions and sentences.

AFFIRMED.

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listed the case number of the prior conviction, indicating to Anthony precisely which conviction on which the government relied. Moreover, the indictment specified the amount of drugs and the statutory provision setting forth the penalties.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-15488
Non-Argument Calendar

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.
RODERICK BROWN, DEFENDANT- APPELLANT

Sept. 25, 2009

PER CURIAM:

In this direct appeal, Roderick Brown appeals (1) his 120-month concurrent sentences for conspiracy to distribute cocaine and possession with intent to distribute cocaine and (2) his conviction and 60-month consecutive sentence for possession of a firearm during a drug trafficking crime. After review, we affirm.

I. BACKGROUND

After filing a 28 U.S.C. § 2255 motion, Brown was granted this out-of-time direct appeal. On appeal, Brown argues that: (1) the district court erred at his resentencing; (2) the government's § 851 enhancement notice was ineffective; and (3) his conviction on Count 8 is invalid. We first review Brown's original district

court proceedings, his § 2255 motion, and his resentencing.

A. Guilty Plea

Brown was charged with nine counts, but pled guilty only to these three counts: (1) conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), and 846 (Count 1); (2) possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii), and 851 and 18 U.S.C. § 2 (Count 7); and (3) possession of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count 8).

The government filed a sentencing-enhancement notice, under 21 U.S.C. § 851, listing Brown's two state felony drug trafficking convictions. The § 851 notice stated that it would rely on those convictions "for the purpose of invoking the enhanced punishment provisions of Title 21, United States Code, Sections 841(b)(1)(C) and 851, as to any sentence imposed upon the Defendant, upon his conviction of the charges contained in the present case." The government served defense counsel with the § 851 notice "by facsimile."

Brown pled guilty to Counts 1, 7, and 8 in exchange for dismissal of the remaining six counts. The plea agreement expressly noted that Brown would be subject to these penalties: (1) on Counts 1 and 7, a mandatory minimum of 10 years' and up to life imprisonment and (2) on Count 8, a mandatory consecutive term of five years' imprisonment. Although the § 851 notice referred to § 841(b)(1)(C),

the plea agreement's reference to a 10-year mandatory minimum is the correct sentence required by § 841(b)(1)(B).[1]

The plea agreement also contained a waiver of Brown's right to appeal or collaterally attack his sentence "[t]o the maximum extent permitted by federal law," unless the sentence resulted from "an upward departure from the otherwise applicable sentencing guideline range" or the government appealed. The government agreed to recommend a sentence at the low end of the guidelines range.

At the plea hearing, the government made the following factual proffer of Brown's offense conduct:

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[1] Section 841(b)(1)(B) is the penalty provision for violations of § 841(a) involving, *inter alia*, 500 grams or more of a mixture or substance containing a detectable amount of cocaine, which was the drug quantity charged in Counts 1 and 7. 21 U.S.C. § 841(b)(1)(B)(ii). Section 841(b)(1)(B) requires a mandatory minimum sentence of five years' imprisonment and allows up to 40 years' imprisonment for a § 841(a) violation involving this drug quantity of cocaine. *Id.* § 841(b)(1)(B). However, if a person commits such a violation after being convicted of a felony drug offense, § 841(b)(1)(B) requires a mandatory minimum sentence of 10 years' imprisonment and allows up to life imprisonment. *Id.*

Section 841(b)(1)(C) does not apply to Brown's case as it is the penalty provision for offenses involving the drugs gamma hydroxybutyric acid and flunitrazepam and the controlled substances in schedules I and II of 21 U.S.C. § 812(c), none of which was charged in Counts 1 and 7. 21 U.S.C. § 841(b)(1)(C). Section 841(b)(1)(C) imposes a maximum sentence of 20 years' imprisonment for violations involving such drugs. *Id.* If a person commits such a violation after a felony drug conviction, § 841(b)(1)(C) imposes a maximum sentence of 30 years' imprisonment. *Id.* Section 841(b)(1)(C) does not impose a mandatory minimum sentence in either situation. *Id.*

[I]n the summer of 2002 an agent or officers from the Dekalb County drug task force began an investigation into the codefendant Gwendolyn Brown, and as part of this investigation a Dekalb County police officer went undercover and began purchasing cocaine from Gwendolyn Brown. It became apparent to them right away that she was being supplied from somewhere, and during the course of the investigation, specifically late in the summer, the undercover officer was present when the defendant, Mr. Roderick Brown, delivered a quantity of cocaine to Ms. Gwendolyn Brown, no relation by the way, your honor, so that Ms. Gwendolyn Brown could then sell the cocaine to the undercover officers. Once the officers were able to identify the defendant Roderick Brown, they set up a deal with Gwendolyn Brown and at the same time set up surveillance on Mr. Roderick Brown's apartment in Smyrna, Georgia.

When the deal was set up, Ms. Gwendolyn Brown said she had to call her supplier. She placed a phone call, which phone records indicated was placed to Roderick Brown. The agents surveilling Mr. Brown's apartment actually saw him leave the apartment then right after the phone call was made, return to the apartment, get a paper bag, bring it out to his car and leave on interstate county 20 to come to Dekalb County.

> Police officers stopped Mr. Brown in his vehicle on interstate 20 just before he got to the exit where Ms. Gwendolyn Brown was waiting. Inside his vehicle, in the paper bag he had been seen carrying, was a quantity of cocaine, about 725 grams of powder cocaine. Additionally, in the vehicle with him was a Taurus 357 caliber revolver.

Brown agreed with the government's factual proffer of his offense conduct.

At the plea hearing, the district court read Counts 1, 7, and 8, including the references to 21 U.S.C. § 841(b)(1)(B) in Counts 1 and 7. The government then reviewed the statutory sentencing ranges on each count, explaining that Counts 1 and 7 had a mandatory minimum of 10 years' imprisonment. The district court reviewed the sentence appeal waiver with Brown, and Brown said that he understood it. The district court accepted Brown's guilty plea.

B. Sentencing

The Presentence Investigation Report ("PSI") calculated Brown's offense level as 25 and criminal history category as I, which yielded an advisory guidelines range of 57 to 71 months' imprisonment. However, the PSI noted that the drug Counts 1 and 7 carried mandatory minimum sentences of 120 months' imprisonment and that the firearm Count 8 carried a mandatory consecutive term of 60 months' imprisonment.

At the sentencing hearing in April 2004, the district court again reviewed the mandatory minimum

sentences. Brown's counsel conceded that "there is nothing the court can do at this point, nothing I can do, so that would leave a sentence of 180 months." The district court sentenced Brown to concurrent terms of 120 months' imprisonment on Counts 1 and 7, followed by a consecutive term of 60 months' imprisonment on Count 8.

On April 26, 2004, the district court entered judgment on Brown's convictions and sentences. Brown's counsel did not file a notice of appeal. Instead, Brown filed a *pro se* notice of appeal six months later, which this Court *sua sponte* dismissed for a lack of jurisdiction.

C. Section 2255 Motion to Vacate

Subsequently, Brown filed a *pro se* 28 U.S.C. § 2255 motion to vacate his sentence challenging his sentence and plea agreement as illegal and his trial counsel as ineffective. Brown asserted that his attorney never filed a notice of appeal, even though Brown wanted to appeal and his attorney agreed to file the notice. Brown later informed the district court that he wished to pursue only this denial-of-appeal claim. Brown requested that the district court vacate his sentences, reimpose the same sentences (with or without a hearing), and allow him to proceed on direct appeal.

In March 2006, the district court denied Brown's § 2255 motion, and Brown timely appealed. The district court granted him a certificate of appealability on the issue of whether "he was denied effective assistance of counsel when his attorney allegedly failed to file a

notice of appeal on his behalf, despite his alleged request that his attorney do so."

While Brown's appeal of the denial of his § 2255 motion was pending in this Court, the government moved the district court to hold an evidentiary hearing on (1) whether Brown requested his attorney to file a notice of appeal and (2) if not, whether Brown's attorney adequately consulted with him about an appeal. The government contemporaneously moved this Court to stay Brown's § 2255 appeal, and we did so. The district court granted the government's motion for an evidentiary hearing. This Court then granted the government's motion to remand Brown's case to the district court and entered an order stating, "This matter is REMANDED IN FULL."

At the § 2255 evidentiary hearing, Brown and Daniel Kane, Brown's former counsel, testified. The district court then entered an order finding that Kane was ineffective for failing to consult with Brown about the advantages and disadvantages of a direct appeal. In Brown's § 2255 case, the district court granted Brown an out-of-time direct appeal.

Brown filed a motion for reconsideration of the district court's order in his § 2255 case. Brown noted that he never filed a motion for an out-of-time direct appeal, but rather filed a § 2255 motion asking that his sentences be vacated. Brown argued that the district court failed to comply with this Court's "remand in full" and should have held a new sentencing hearing to address Brown's sentencing arguments. Brown argued to the district court that the government's § 851 notice incorrectly cited § 841(b)(1)(C), which did not provide for an enhancement of the mandatory minimum sentences

for the offenses charged in Counts 1 and 7. Brown argued that his original sentences on Counts 1 and 7 thus were illegally based on incorrect mandatory minimum sentences.

The district court granted Brown's motion for reconsideration. The district court stated that it erred in saying it was granting Brown's motion for an out-of-time appeal because Brown had filed only a § 2255 motion. The district court amended its order to state that it was granting Brown's § 2255 motion, vacating his original judgment and sentences, and scheduling a resentencing hearing.[2]

D. Resentencing

Before the resentencing hearing, Brown filed a memorandum reiterating his previous claim that the government's § 851 notice was ineffective and that the mandatory minimum sentences for Counts 1 and 7 should have been 60, not 120, months' imprisonment. As to the indictment, Brown argued that it failed to allege a crime under § 924(c) on Count 8 because it stated that he "possessed" a firearm "during and in relation to" a drug trafficking crime, instead of alleging that he "possessed" a firearm "in furtherance of" a drug trafficking crime or "used or carried" a firearm "during and in relation to" a drug trafficking crime.

In response, the government (1) filed an amended § 851 notice changing the enhancement citation from 21 U.S.C. § 841(b)(1)(C) to § 841(b)(1)(B), (2) argued

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[2] The government did not appeal this order.

that the § 851 notice timely placed Brown on notice of his two prior convictions on which the government relied, and (3) pointed out that Brown was not entitled to a de novo resentencing because this Court did not vacate Brown's sentences but remanded only on the issue of his counsel's failure to file a notice of appeal. The government also argued that Brown could not now challenge the indictment without withdrawing his guilty plea.

At the resentencing hearing, the district court declined to consider any of Brown's arguments and simply re-imposed Brown's original sentences.[3] Brown timely appealed the district court's order reimposing his original sentences.

II. DISCUSSION

A. Reimposition of Original Sentences

Brown argues that the district court erred in reimposing his original sentences and declining to consider his sentencing arguments in light of this Court's remand in full.[4] In similar § 2255 cases where a district court found a defendant was denied his right to a direct appeal, we have instructed that the sentences should be vacated and reimposed to allow a timely appeal, as follows:

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[3] After the resentencing hearing, Brown filed a supplemental memorandum, arguing that the § 851 notice was served improperly on Brown's counsel by facsimile.

[4] We review de novo questions of law, including a district court's determination regarding the scope of its legal authority. *United States v. Martinez*, 241 F.3d 1329, 1330 (11th Cir. 2001).

> When the district courts of this circuit conclude that an out-of-time appeal in a criminal case is warranted as the remedy in a § 2255 proceeding, they should effect that remedy in the following way: (1) the criminal judgment from which the out-of-time appeal is to be permitted should be vacated; (2) the same sentence should then be reimposed; (3) upon reimposition of that sentence, the defendant should be advised of all the rights associated with an appeal from any criminal sentence; and (4) the defendant should also be advised that the time for filing a notice of appeal from that re-imposed sentence is ten days, which is dictated by [Federal Rule of Appellate Procedure] 4(b)(1)(A)(i).

United States v. Phillips, 225 F.3d 1198, 1201 (11th Cir. 2000). In following this Phillips procedure, a district court is not required to hold a resentencing hearing. *United States v. Parrish*, 427 F.3d 1345, 1348 (11th Cir. 2005). Accordingly, after finding that Brown was entitled to an out-of-time direct appeal, the district court properly followed the Phillips procedure by reimposing Brown's original sentences to allow that direct appeal.

Brown also argues that this Court's remand permitted the district court to consider any sentencing issue anew. Brown relies on *United States v. Jones*, 36 F.3d 1068, 1069-70 (11th Cir. 1994), where the district court was allowed to consider the defendant's drug quantity challenge on remand. Jones, however, involved the district court's authority to consider sentencing issues after this Court had vacated the defendant's sentence on direct appeal and remanded in

full to the district court. *Id.* In contrast, our remand here came on appeal of the denial of Brown's § 2255 motion. This Court did not vacate Brown's original sentences. Rather, we remanded to the district court, on request by the government, for an evidentiary hearing on Brown's § 2255 claim that his counsel was ineffective for failing to file a notice of appeal. Because the procedural posture of this case was akin to Phillips, not Jones, the district court properly followed the Phillips procedure after awarding Brown an out-of-time direct appeal.

B. Brown's Direct Appeal as to § 851 Notice

In his direct appeal, Brown challenges his drug sentences on the grounds that the government's § 851 notice was ineffective because (1) it was served by facsimile and (2) it cited 21 U.S.C. § 841(b)(1)(C), rather than § 841(b)(1)(B), as the relevant penalty provision.[5] Because the § 851 notice was deficient, Brown argues that the district court lacked jurisdiction and power to increase his drug sentences from a 60-month to a 120-month mandatory

[5] To the extent that Brown argues that his trial counsel was ineffective for failing to object to his sentences on the grounds that he raises now, we decline to consider those issues on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504-05 (2003). The district court's evidentiary hearing was limited to the issue of whether Brown's trial counsel should have filed a notice of appeal. Ineffective counsel claims generally are heard on collateral review where the record can be developed. Also, the issue of whether his ineffective assistance of counsel claims were waived by his sentence appeal waiver can be addressed at that time.

minimum.[6] The government responds that Brown's claims are barred by his sentence appeal waiver.

A defendant may waive his right to appeal his sentence as part of a plea agreement. *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999). But we have stated that "a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a)" and that "this jurisdictional defect is not waivable." *Harris v. United States*, 149 F.3d 1304, 1306, 1309 (11th Cir. 1998) (concluding that a challenge to a § 851 notice was not procedurally defaulted, even where the defendant did not raise it in the district court or on direct appeal, because the issue is jurisdictional).[7] The government stresses that Brown's case is materially different from *Harris*, where the government did not file a § 851 notice at all until after the defendant's

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[6] We review de novo the adequacy of a § 851 notice. *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007). "Subject matter jurisdiction of the district court is a question of law subject to de novo review." *United States v. Moore*, 443 F.3d 790, 793 (11th Cir. 2006).

[7] This Court in *Harris* explained that:

> "An enhanced sentence is a special remedy prescribed by the Congress; prosecutorial discretion is vested in the executive branch of the government, and the district court has no authority to exercise it or pretermit it. . . . Unless and until prosecutorial discretion is invoked and the government files and serves an information as required by Sec. 851, the district court has no power to act with respect to an enhanced sentence; it can no more enhance the sentence than it could impose imprisonment under a statute that only prescribes a fine." 149 F.3d at 1306 (quoting *United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1983)).

guilty plea and Harris had not agreed to a sentence appeal waiver. We have not had an opportunity previously to apply *Harris* in a case where a defendant has a sentence appeal waiver and the § 851 notice was timely filed before the plea. But we need not confront these thorny jurisdictional and waiver issues here because, as outlined below, both of Brown's challenges to the § 851 notice lack merit in any event.

First, Brown argues that the government did not properly serve his counsel with the § 851 notice. *See United States v. Novaton*, 271 F.3d 968, 1015 (11th Cir. 2001). Although the government timely served the § 851 notice on Brown's counsel and Brown admits the notice was received, Brown complains that the service was by facsimile and his counsel had not consented in writing to service by electronic means.[8] Section 851 itself does not specify how service shall be made. Rather, Brown is relying on the service procedures in the federal rules. However, Brown made no objection to the form of service in the district court. Furthermore, we have upheld § 851 notices where the government technically did not comply with § 851. *See, e.g.*, *United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990) (upholding § 851 notice where the government filed a § 851 notice four days after the start of trial, which was contrary to § 851(a)'s requirement that the notice be filed before trial, because "[b]y personally serving [the defendant] and his counsel with a copy of the information prior to

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[8] *See* Fed. R. Crim. P. 49(b) (noting that "[s]ervice must be made in the manner provided for a civil action"); Fed. R. Civ. P. 5(b)(2)(E) (stating that "[a] paper is served under this rule by . . . sending it by electronic means if the person consented in writing").

trial, and by advising the court orally that it was filing an information for purposes of sentence enhancement, the government complied with the mandatory requirements of section 851"); *see also Perez v. United States*, 249 F.3d 1261, 1266-67 (11th Cir. 2001) (upholding § 851 notice where the government listed the incorrect date of the defendant's prior conviction).

As in *Weaver*, the government here complied with § 851(a) by filing the § 851 notice with the court and by timely sending it to Brown's attorney before his guilty plea. Neither Brown's attorney nor Brown claimed that he did not receive the government's § 851 notice. And, as noted above, there was no objection to service by facsimile in the district court. Thus, as in Weaver, we conclude that the government's notice complied with § 851(a).

Second, Brown argues that the district court lacked jurisdiction to enhance his drug sentences because the government's § 851 notice incorrectly cited the penalty provision in § 841(b)(1)(C) instead of § 841(b)(1)(B).[9] In *Perez*, we addressed a similar challenge to a technical error in the contents of a § 851 notice. The government's § 851 notice incorrectly stated that the defendant's prior conviction occurred in 1991 instead of 1992. *Perez*, 249 F.3d at 1263. This Court concluded that the government's notice complied with § 851(a) because it was timely filed with the court, was timely served upon the defendant's counsel, and described the prior conviction. *Id.* at 1266. We said that, "[d]espite the incorrect last digit in the year of the prior conviction, the Original Information unambiguously signaled the government's intent to

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[9] See *supra* note 1.

rely upon a specific prior cocaine conviction in Florida to enhance [the defendant's] sentence." *Id.* This Court also noted that the defendant "does not allege any confusion as to which conviction the government referred" in the § 851(a) notice. *Id.* at 1267.

Here, the government similarly complied with § 851's requirements, despite the incorrect citation to § 841(b)(1)(C). The government timely filed the notice with the court and timely served Brown's counsel with the notice. The § 851 notice correctly listed Brown's prior convictions. Despite the citation error, Brown was fully aware that the penalty provisions of § 841(b)(1)(B) applied because: (1) Counts 1 and 7 expressly charged Brown under § 841(b)(1)(B); (2) the plea agreement stated that the mandatory minimum sentences on Counts 1 and 7 were 10 years, and 10 years is the enhanced sentence provided for in § 841(b)(1)(B); and (3) Brown acknowledged those mandatory minimum 10-year terms at the plea hearing and sentencing. Brown never expressed any confusion regarding the contents of the § 851 notice or the applicable mandatory minimum 10-year sentences during the original district court proceedings.

For these reasons, we affirm Brown's 120-month concurrent sentences on the drug Counts 1 and 7.[10]

C. Insufficient Charge in Count 8

Brown also claims that his conviction on Count 8 is invalid because the indictment failed to allege a

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[10] We deny the government's January 16, 2009 motion to dismiss Brown's appeal.

federal crime under 18 U.S.C. § 924(c). A defendant violates section 924(c) if he (1) "during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm" or (2) "in furtherance of any such crime, possesses a firearm." 18 U.S.C. § 924(c)(1)(A). Count 8 alleged that Brown "during and in relation to a drug trafficking crime . . . did knowingly possess a firearm." Brown contends that the indictment failed to charge a § 924(c) offense because it combined the "during and in relation to" part of the first prong of § 924(c)(1)(A) with the "possesses a firearm" part of the second prong of § 924(c)(1)(A).[11]

It is clear that Count 8 of the indictment was defective in that it did not correctly state the elements of a § 924(c) offense. The question here is whether that defect invalidates Brown's guilty plea to Count 8. Before we can address that issue, however, we must first determine whether Brown waived this indictment-defect argument by pleading guilty. An unconditional guilty plea waives all non-jurisdictional challenges to a defendant's conviction. *United States v. Betancourth*, 554 F.3d 1329, 1332 (11th Cir. 2009). Brown argues that an indictment's failure to allege a federal offense is a jurisdictional defect that cannot be waived.

To resolve Brown's argument, we review the decisions in *United States v. Cotton*, 535 U.S. 625 (2002), and *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002), which clarified that not all defects in an indictment are jurisdictional. In *Cotton*, the indictment charged the defendants with two drug

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[11] As noted earlier, we review *de novo* questions of subject matter jurisdiction. *Moore*, 443 F.3d at 793.

crimes but did not allege a drug quantity. 535 U.S. at 627-28. The district court made a drug quantity finding that increased the statutory maximum sentences and sentenced the defendants accordingly. *Id.* at 628. The Supreme Court addressed whether the omission from the indictment of a fact that increased the statutory maximum sentence, *i.e.*, the drug quantity, was a jurisdictional defect. *Id.* at 629, 122 S. Ct. at 1784.

In *Cotton*, the Supreme Court explained that the view that indictment defects were jurisdictional derived from *Ex parte Bain*, 121 U.S. 1 (1887), and was "a product of an era in which this Court's authority to review criminal convictions was greatly circumscribed." *Cotton*, 535 U.S. at 629. "The Court's desire to correct obvious constitutional violations led to a somewhat expansive notion of jurisdiction, which was more a fiction than anything else." *Id.* at 629 (internal quotation marks and citations omitted). The Supreme Court assessed that "*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, the courts' statutory or constitutional power to adjudicate the case." *Id.* at 630 (internal quotation marks omitted). After reviewing its precedent after *Bain*, the Supreme Court stated that "this Court some time ago departed from *Bain*'s view that indictment defects are 'jurisdictional'" and concluded that "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled." *Id.* at 631.

This Court then applied *Cotton* in *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002) In *Peter*, we noted that the Supreme Court rejected the view that all indictment defects are jurisdictional and that this

Court had distinguished between indictment omissions (such as failing to allege an element of an offense) and indictments that affirmatively alleged conduct that either is not proscribed by the charging statute or is beyond the sweep of the charging statute. 310 F.3d at 713-14 (discussing our prior decisions in *United States v. Tomeny*, 144 F.3d 749 (11th Cir. 1998), *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001), and *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (en banc)). Defendant Peter's guilty plea to conspiring to violate the Racketeering Influenced and Corrupt Organizations Act ("RICO") and the predicate crime of mail fraud was based on his admission that he made misrepresentations in license applications that he mailed to a Florida state agency. *Id.* at 711. Because mail fraud offenses require that the object of the fraud be property and state licenses do not constitute such property, the defendant argued that his RICO conviction was invalid because his conduct was not a crime under the predicate mail fraud statute. *Id.*

In *Peter*, this Court agreed with the defendant that "the Government affirmatively alleged a specific course of conduct [*i.e.*, mailing state license applications containing misrepresentations] that is outside the reach of the mail fraud statute." *Id.* at 715. Thus, the indictment charged a non-offense. *Id.* In *Peter*, we also pointed out that in *Cotton* "the prosecution's evidence had been 'overwhelming and essentially uncontroverted' on the very point of fact which the indictment had erroneously failed to allege." *Id.* at 714 (quoting *Cotton*, 535 U.S. at 633).

In Brown's case, the indictment defect was an omission of an element of the charged crime and not

an affirmative allegation of conduct beyond the reach of the charging statute. As an initial matter, Count 8 specifically referred to 18 U.S.C. § 924(c) and thus provided Brown with adequate notice of the charge against him. *See United States v. Fern*, 155 F.3d 1318, 1325 (11th Cir. 1998) ("If an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge."); *United States v. Stefan*, 784 F.2d 1093, 1101-02 (11th Cir. 1986) ("[W]hen the indictment specifically refers to the statute on which the charge was based, the statutory language may be used to determine whether the defendant received adequate notice.").

And, importantly, at the plea hearing, Brown admitted to conduct that established the omitted element of the charged crime. The government proffered these facts, which Brown admitted: (1) the government arranged a controlled drug transaction through Gwendolyn Brown, a woman to whom Brown previously had sold drugs; (2) immediately after the phone call with Gwendolyn Brown, officers saw Brown leave his apartment with a paper bag and enter his car; (3) officers stopped Brown in his vehicle just before he got to the interstate exit where Gwendolyn Brown was supposed to be waiting; and (4) a search of Brown's vehicle recovered the paper bag he had been seen carrying, which contained about 725 grams of powder cocaine, and a Taurus 357 caliber revolver. This conduct clearly falls within and establishes both of § 924(c)'s prongs. *See United States v. Timmons*, 283 F.3d 1246 (11th Cir. 2002) (concluding evidence that defendant carried a shoe-box containing a firearm and drugs to an arranged transaction was sufficient to

show he "carried" the firearm "during and in relation to" a drug trafficking crime and that the bulletproof vest, crack cocaine, loaded firearms, and ammunition seized from defendant's home was sufficient to show that he possessed the firearms "in furtherance of" drug trafficking); *United States v. Wilson*, 183 F.3d 1291, 1295-96 (11th Cir. 1999) (concluding evidence was sufficient to support a § 924(c) conviction where defendant was arrested in a vehicle containing two bottles of crack cocaine under the front seats and had a pistol on the dashboard); *United States v. Range*, 94 F.3d 614, 617 (11th Cir. 1996) (concluding evidence was sufficient to support a § 924(c) conviction where the defendant was arrested in the process of an arranged cocaine transaction and a loaded pistol and bag containing $40,000 in cash was found under the mat by the front seat of his vehicle).

Thus, the particular indictment omission in this § 924(c) case did not deprive the district court of power to adjudicate Brown's case or to accept Brown's guilty plea. Rather, the indictment defect here is non-jurisdictional and was waived by Brown's guilty plea.[12]

III. CONCLUSION

We affirm Brown's 120-month concurrent sentences on Counts 1 and 7 and his § 924(c) conviction and sentence on Count 8.

AFFIRMED.

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[12] We note that Brown does not argue that his guilty plea was not knowing and voluntary.

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146

(3)

No. 09-244

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MIKOLA BOWDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 2, 9
Ashwander v. *TVA*, 297 U.S. 288 (1936) 8
Bowles v. *Russell*, 551 U.S. 205 (2007) 9, 10
Eberhart v. *United States*, 546 U.S. 12 (2005) 4, 12
Harris v. *United States*, 149 F.3d 1304 (11th Cir. 1998) 1, 7
John R. Sand & Gravel Co. v. *United States*, 128 S. Ct. 750 (2008) 9, 10
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 4
Sapia v. *United States*, 433 F.3d 212 (2d Cir. 2005) 2, 9
Schweiker v. *Hansen*, 450 U.S. 785 (1981) 11
Strickland v. *Washington*, 466 U.S. 668 (1984) 5
United States v. *Anthony*, No. 08-14370, 2009 WL 2883457 (11th Cir. Sept. 10, 2009) 6
United States v. *Brown*, No. 08-15488, 2009 WL 3052212 (11th Cir. Sept. 25, 2009) 6
United States v. *Ceballos*, 302 F.3d 679 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137, 538 U.S. 926, and 538 U.S. 939 (2003) 9
United States v. *Cotton*, 535 U.S. 625 (2002) ... 1, 2, 4, 5, 11
United States v. *Hasting*, 461 U.S. 499 (1983) 4
United States v. *Jackson*, 544 F.3d 1176 (11th Cir. 2008), cert. denied, 129 S. Ct. 1925 (2009) 6
United States v. *King*, 559 F.2d 810 (8th Cir.), cert. denied, 130 S. Ct. 167 (2009) 8
United States v. *Olano*, 507 U.S. 725 (1993) 3, 5
United States v. *Pritchett*, 496 F.3d 537 (6th Cir. 2007) 2

Cases—Continued: Page

United States v. *Resendiz-Ponce*, 549 U.S. 102 (2007) 8
United States v. *Salinas* 480 F.3d 750 (5th Cir.), cert. denied, 128 S. Ct. 487 (2007) 8
United States v. *Villafuerte*, 502 F.3d 204 (2d Cir. 2007) 8
United States v. *Williams*, 584 F.3d 714 (7th Cir. 2009) 3
Zipes v. *TWA*, 455 U.S. 385 (1982) 9

Statutes and rule:

Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*:
21 U.S.C. 851 ..... *passim*
21 U.S.C. 851(a) ..... *passim*
21 U.S.C. 851(a)(1) 5
28 U.S.C. 2107(a) 10
Fed. R. Crim. P. 52(b) 2

In the Supreme Court of the United States

No. 09-244

UNITED STATES OF AMERICA, PETITIONER

v.

MIKOLA BOWDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In this case, the Eleventh Circuit, adhering to its decision in *Harris* v. *United States*, 149 F.3d 1304 (1998), held that the government's failure to file a notice that complies fully with the procedural requirements of 21 U.S.C. 851(a) divested the district court of its "jurisdiction" to impose an enhanced, recidivism-based sentence on a convicted drug offender. The court of appeals therefore invalidated that sentence without applying plain-error review, even though respondent had not asserted the Section 851 error in the district court. As the government explained in its petition for a writ of certiorari, the court of appeals' decision is incorrect: it relies on an expansive and outdated definition of the term "jurisdiction," which has been superseded by, and cannot be squared with, a string of this Court's more recent precedents, including *United States* v. *Cotton*, 535 U.S. 625 (2002). Those decisions establish that the term "jurisdic-

tion" refers to "the courts' statutory or constitutional *power* to adjudicate the case," *id.* at 630 (citation omitted)—a power that is not addressed or limited by Section 851. See *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006) (citing *Cotton* for the proposition that "jurisdiction" "involves a court's power to hear a case").

The decision below also perpetuates a conflict in the circuits on this issue. The eight other courts of appeals that have considered the issue have rejected the Eleventh Circuit's outlier position, holding that "[Section] 851 simply 'has nothing to do with [a court's] subject-matter jurisdiction' over a criminal case or a court's general power to impose a sentence," *Sapia* v. *United States*, 433 F.3d 212, 217 (2d Cir. 2005) (second brackets in original). Those courts therefore hold that the absence of a timely objection to a Section 851 error results in a forfeiture and requires plain-error review under Fed. R. Crim. P. 52(b) on appeal. See *Sapia*, 433 F.3d at 217. The question whether noncompliance with Section 851(a) deprives a district court of its statutory power to impose an enhanced sentence is important, and it is squarely presented in this case. This Court's intervention—whether in the form of summary reversal or plenary review—is warranted.

1. Respondent does not dispute that the Eleventh Circuit stands alone against the eight other courts of appeals that have considered the question presented. See Pet. 16-18; *United States* v. *Pritchett*, 496 F.3d 537, 542, 546 (6th Cir. 2007) (noting that "[a]n almost-unanimous majority of circuits that have addressed the issue have held that the section 851(a) requirements are not jurisdictional"; "The only circuit holding that the section 851(a)(1) requirements are jurisdictional is the Eleventh."). Instead, respondent's lead contention is that this Court's intervention is unneces-

sary because the issue is not important. That contention lacks merit.

a. The question presented is important to the administration of the criminal justice system. Section 851(a), which was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, authorizes enhanced penalties for recidivist drug offenders. As the government explained in the petition, Pet. 19-22, the decision below frustrates the purpose of Section 851 because it permits a defendant to escape the congressionally authorized sentence on the basis of unpreserved errors that caused him no prejudice. Respondent is incorrect that the question presented "almost never arises." Br. in Opp. 7-10. Courts regularly address unpreserved claims of Section 851 error, as illustrated by the cases that respondent himself discusses in his brief and includes in his appendix. See *id.* at 13-17; Br. in Opp. App. 11a, 26a. The Court's resolution of this case will determine whether such errors must be noticed on appeal or collateral review despite the defendant's failure to preserve them in the district court.

Respondent observes (Br. in Opp. 8-9) that unpreserved claims of Section 851 error do not often result in the invalidation of enhanced sentences. That is unsurprising, because the Eleventh Circuit is the only court of appeals to adhere to the "jurisdictional" characterization of Section 851. Other courts deny relief on such claims under the rigorous plain-error standard of review. See, *e.g.*, *United States* v. *Williams*, 584 F.3d 714, 718-719 (7th Cir. 2009); *United States* v. *Olano*, 507 U.S. 725, 732 (1993) (power to correct forfeited errors on plain-error review is "circumscribed"). The decisions below and in *Harris* nevertheless demonstrate that the Eleventh Circuit does invoke its "jurisdictional" characterization to strike down sentences on the basis of errors that the defendant did not preserve and

that did not result in prejudice. In these circumstances, the court of appeals has invalidated congressionally authorized sentences under a manifestly erroneous rule of law that conflicts with the view of eight other courts of appeals and with decisions of this Court. That result warrants this Court's review, particularly because, in invoking this rule, the Eleventh Circuit has relied on an outdated understanding of the term "jurisdiction" that this Court has repeatedly sought to dispel. See *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam); *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004) (instructing that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority"); *Cotton*, 535 U.S. at 630.

b. Respondent asserts that the question presented is unimportant because "[c]ompliance with Section 851 lies completely within the control of the Government." Br. in Opp. 10. That argument is also incorrect. Despite the best efforts of prosecutors and judges, good-faith mistakes inevitably arise in the course of filing Section 851(a) notices. Cf. *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983) (reiterating that "there can be no such thing as an error-free, perfect trial" because of "the reality of the human fallibility of the participants"). The type of error alleged in this case—listing the wrong date of conviction—is attributable in part to the large differences in the form and content of rap sheets generated by state and local jurisdictions across the country. Federal prosecutors can and do strive to minimize the frequency with which such errors occur, but that does not diminish the significance of the Eleventh Circuit's position that, when such errors do arise, they must be no-

ticed regardless whether the defendant raised them in the district court.

c. This case squarely presents the conflict among the courts of appeals on the question presented. As the petition explained, both the analysis of this issue and the outcome of this case would have been different had the case arisen in one of the eight courts of appeals that do not treat the requirements of Section 851(a) as "jurisdictional." Those courts would have applied plain-error review, requiring respondent to show, *inter alia*, that the alleged defects in the information "affec[ted his] substantial rights" by causing him prejudice and also "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (citation omitted). Respondent could not satisfy either of those showings. As a result, in those eight courts, respondent would not have received a sentence far less than that mandated by law because of a non-prejudicial error in the Section 851(a) notice that he never raised in the district court. *Cotton*, 535 U.S. at 634.[1]

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[1] As further support for his contention that the question presented is not significant, respondent argues (Br. in Opp. 9-10) that the courts of appeals that have rejected the Eleventh Circuit's position may nevertheless grant a defendant relief from an enhanced sentence on the ground that the Section 851 error was plain or that counsel was ineffective in failing to assert it in the district court. This case illustrates why that contention is erroneous. Because respondent could not have established that he was prejudiced by the flaws in the notice of enhancement, he could not satisfy the plain-error standard. See Pet. 23. And because the government would have amended the notice of enhancement in the district court if counsel had raised those flaws before sentencing, see 21 U.S.C. 851(a)(1) ("Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence"), respondent could not show ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984) (requiring a showing of both deficient performance and prejudice).

2. Respondent nonetheless contends that this case is a poor vehicle in which to consider the question presented. That contention is based on his assertions that the law in the Eleventh Circuit is "unsettled," that the court of appeals should be afforded an opportunity to reconsider its position, and that this Court would have no occasion to reach the question presented if it granted review. Br. in Opp. 12-20. Each of those assertions is incorrect.

a. The Eleventh Circuit has never wavered from its position, expressed in *Harris*, that a timely, accurate, and complete Section 851(a) notice is "jurisdictional" in nature. See, *e.g.*, *United States* v. *Jackson*, 544 F.3d 1176, 1184-1185 (2008) ("We recognize that the [Section] 851 'notice requirement is jurisdictional: unless the government strictly complies, the district court lacks jurisdiction to impose the enhanced sentence.' *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007); *see United States v. Thompson*, 473 F.3d 1137, 1144 (11th Cir. 2006) * * *; *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998)."), cert. denied, 129 S. Ct. 1925 (2009). Indeed, the Eleventh Circuit reaffirmed that longstanding position in the two decisions, issued after the decision below, that respondent cites (Br. in Opp. 15-17) and includes in the appendix to his brief. See *United States* v. *Anthony*, No. 08-14370, 2009 WL 2883457, at *5 (Sept. 10, 2009) (unpub.); Br. in Opp. App. 12a (Section 851(a) "notice requirement is jurisdictional: unless the government strictly complies, the district court lacks jurisdiction to impose the enhanced sentence.") (citing cases so holding); *United States* v. *Brown*, No. 08-15488, 2009 WL 3052212, at *5 (11th Cir. Sept. 25, 2009); Br. in Opp. App. 26a ("[A] district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a),"

and "this jurisdictional defect is not waivable") (citing *Harris*, 149 F.3d at 1306, 1309).

To the extent there is any lack of clarity in the Eleventh Circuit's law concerning Section 851(a), it concerns the entirely separate question of what constitutes adequate compliance. See Br. in Opp. 8-10 & n.2. But any inconsistency on that question cannot and does not detract from the clarity of the Eleventh Circuit's position that, when compliance is inadequate, a district court is divested of its jurisdiction to impose an enhanced sentence. That latter conclusion is the focus of this petition, and its correctness is squarely presented by this case.

There is no merit to respondent's related contention (Br. in Opp. 12-14) that the Eleventh Circuit should be afforded an opportunity to reconsider its decision in *Harris*. As respondent observes, the government opposed certiorari in three prior cases presenting this issue precisely to give the Eleventh Circuit this opportunity. See *ibid.* That is why, before seeking this Court's intervention, the government petitioned for en banc review in this case, urging the full court of appeals to overturn *Harris*. That en banc request provided the Eleventh Circuit a clear chance to revisit its position, and by declining the government's request, the Eleventh Circuit indicated that it did not intend to do so. As noted, the Eleventh Circuit has confirmed that intent by reaffirming the *Harris* rule in cases issued after the decision below. The Eleventh Circuit's position is settled and ripe for this Court's review.

b. Respondent asserts (Br. in Opp. 18-19) that this Court might not reach the question presented because it "would appropriately first consider" whether there was any error in the first instance—*i.e.*, whether the notice was in fact compliant with Section 851(a)—and could rest a reversal on that ground. That suggestion, of course, is inconsis-

tent with respondent's claim (*id.* at 27) that sustaining the "ambiguous" notice here would violate congressional intent to entrust the enhancement decision "to the prosecution and not the courts." But in any event, no principle of law or logic requires this Court to decide whether error occurred before resolving whether, if error occurred, it was plain. Indeed, the plain-error ground would be the narrower basis for decision. See, *e.g.*, *United States* v. *Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007) ("[W]e need not decide whether the district court erred here because any possible error is not plain."); *United States* v. *King*, 559 F.3d 810, 814 (8th Cir.) (same), cert. denied, 130 S. Ct. 167 (2009); *United States* v. *Salinas*, 480 F.3d 750, 759 (5th Cir.) (same), cert. denied, 128 S. Ct. 487 (2007).

For that reason, respondent's reliance on *United States* v. *Resendiz-Ponce*, 549 U.S. 102 (2007), is misplaced. The question on which the Court granted certiorari in that case was whether the omission of an element from an indictment can constitute harmless error. The Court declined to reach that constitutional question because there was a narrower basis for its decision, and "'[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Id.* at 104 (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). That avoidance canon is inapplicable in this case because the question presented is not constitutional, and respondent cites no analogous rule of law that would require the Court to decide the statutory compliance issue before addressing the legal consequences of respondent's failure to object.

3. Respondent fails in his attempt (Br. in Opp. 20-28) to defend the decision below on the merits. For the reasons explained in the petition, Section 851 has none of the attributes that this Court has identified as indicative of jurisdic-

tional status. The provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh* v. *Y&H Corp.*, 546 U.S. at 514-515 (2006). *Id.* at 515 (quoting *Zipes* v. *TWA*, 455 U.S. 385, 394 (1982)). As every court of appeals other than the Eleventh Circuit to consider the issue has concluded, "[Section] 851 simply 'has nothing to do with [a court's] subject-matter jurisdiction' over a criminal case or a court's general power to impose a sentence." *Sapia* v. *United States*, 433 F.3d at 217 (quoting *United States* v. *Ceballos*, 302 F.3d 679, 692 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137, 538 U.S. 926, and 538 U.S. 939 (2003)); see Pet. 16-18.

Respondent's challenge to that conclusion relies primarily on two recent decisions of this Court, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750 (2008), and *Bowles* v. *Russell*, 551 U.S. 205 (2007). Respondent contends that those decisions support a categorical distinction between statutory rules, which are jurisdictional, and court-promulgated rules, which are not. He argues that because Section 851 was imposed by Congress, it "necessarily falls on the statutory—and therefore jurisdictional—side of the ledger." Br. in Opp. 21. That contention is incorrect.

The "statutory origin" of Section 851 does not support the Eleventh Circuit's characterization of its requirements as "jurisdictional." Br. in Opp. 22. In *Arbaugh*, this Court announced a general rule of construction that "when Congress does not rank a statutory limitation * * * as jurisdictional, courts should treat the restriction as nonjurisdictional in character." 546 U.S. at 516. For the reasons the government has identified, there is no indication that Congress ranked the notice provisions and procedurals rights in Section 851 as jurisdictional in nature, and courts therefore must treat them as nonjurisdictional. Neither *John R. Sand* nor *Bowles* required that all statutory rules be treat-

ed as "jurisdictional" or retreated from this Court's careful definition of that term in *Cotton*, *Kontrick*, and *Eberhardt*. Instead, both *John R. Sand* and *Bowles* relied on this Court's settled construction of a particular statute and applied *stare decisis* to hold that certain time limits are jurisdictional even though not denominated as such. See *John R. Sand*, 128 S. Ct. at 753-754, 756-757 (relying on *stare decisis* to hold that the statute of limitations governing the Court of Federal Claims is jurisdictional); *Bowles*, 551 U.S. at 209-210 & n.2 (citing "a century's worth of precedent" supporting the conclusion that 28 U.S.C. 2107(a)'s time limit for filing a notice of appeal is jurisdictional). In addition, the statutory provision at issue in *Bowles* provides that, unless the notice of appeal in a federal civil case is filed in a timely fashion, "no appeal shall bring any judgment, order or decree * * * before a court of appeals for review." 28 U.S.C. 2107(a). In contrast to Section 851, that provision speaks to adjudicatory power by stating that an untimely notice of appeal will not bring the case to the court. *John R. Sand* and *Bowles* therefore provide no support to the decision below.

Respondent argues (Br. in Opp. 25-27) that the Eleventh Circuit's position comports with Congress's intent because the purpose of Section 851 is to afford defendants notice about the possibility of an enhanced sentence. In respondent's view, that purpose is frustrated when the government does not comply with the specific procedures Congress provided. But that argument does not explain why Section 851, unlike other provisions that govern the conduct of litigation, should be exempted from the general rule that they may be forfeited or waived if not timely asserted in the district court. For the reasons the government explained in the petition, there is no basis for such an exemption. Although Congress prescribed procedures in Section 851

for the imposition of an enhanced sentence, it did not intend to permit recidivist drug offenders to escape such sentences when, because of prosecutorial oversight, an information filed under Section 851 contains easily corrected errors that cause the defendant no prejudice and to which he did not object. See Pet. 22.

Finally, respondent asserts that Section 851 is analogous to a charging decision and contends that "[a] court has no greater jurisdiction to enter an enhanced statutory sentence based on a defective information from the prosecution than it would have to enter a judgment of conviction in the absence of a criminal charge." Br. in Opp. 28. That argument, however, is foreclosed by *Cotton*, which held that defects in the charging instrument do not deprive the district court of jurisdiction to enter a conviction. See *Cotton*, 535 U.S. at 631. *Cotton* compels the conclusion that, contrary to respondent's assertion, a court also does not lose "jurisdiction" to impose an enhanced sentence as a result of defects in the notice of enhancement filed under Section 851.

4. The petition suggested that, because the Eleventh Circuit's position is not only wrong but also at odds with this Court's precedents and all other decisions of the courts of appeals, the Court may wish to consider summary reversal. Respondent disagrees, contending that summary reversal should be reserved for situations in which "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." Br. in Opp. 20 (quoting *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). Assuming that respondent's standard accurately encapsulates the circumstances when summary reversal is warranted, those circumstances are present here. The law regarding the types of errors that are properly classified as "jurisdictional"—*i.e.*, those that Congress has

specifically denominated as limiting the court's adjudicatory power—is settled by this Court's recent decisions. The relevant facts of this case are not in dispute, and the decision below is incorrect because it rests on an outmoded and overly expansive definition of the term "jurisdiction." Summary reversal therefore is no less appropriate here than it was in *Eberhart*. See 546 U.S. at 13.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted.

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Solicitor General

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